

1 UNITED STATES OF AMERICA
2 SOUTHERN DISTRICT OF ILLINOIS

3 CATHERINE ALEXANDER,)
4 Plaintiff,)
5 v.) No. 3:18-cv-00966-SMY
6 TAKE-TWO INTERACTIVE SOFTWARE,)
7 INC., et al.,) *East St. Louis, IL*
8 Defendants.)

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11 TRANSCRIPT OF JURY TRIAL PROCEEDINGS
12 DAY 2 OF 5

13 BEFORE THE HONORABLE STACI M. YANDLE
14 UNITED STATES DISTRICT JUDGE

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21 September 27, 2022

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1 (Proceedings began in open court at 8:55 a.m., jury
2 not present.)

3 COURTROOM DEPUTY: The Court calls Case No.
4 18-CV-966, *Alexander versus Take-Two Interactive Software*
5 *Inc., et al.* This matter is called for Day Two of jury
6 trial.

7 would the parties please state your presence for
8 the record, beginning with plaintiff?

9 MR. SIMON: Your Honor, Anthony Simon, Anthony
10 Friedman, Paul Tahan and Mr. Crompton for the plaintiffs.

11 THE COURT: Good morning.

12 MS. CENDALI: Good morning, Your Honor. Dale
13 Cendali, Michael Nester, Joshua Simmons, Miranda Means, and
14 Chris Ilardi for the Take-Two defendants.

15 MR. KRASIK: Good morning, Your Honor. Curt Krasik
16 for WWE.

17 THE COURT: Good morning, counsel.

18 It's my understanding that, at 8:55, you guys now
19 want to take something up before we start at 9:00. I --
20 again, let me just reiterate. If there are any, any issues
21 that we need to take up before we begin at 9:00, I'm here
22 by 8:30. And I would ask that you notify Michelle at that
23 time, because I intend to start at 9:00. I don't like to
24 have the jurors sitting around.

25 what's the issue?

1 MR. SIMMONS: Your Honor, in reviewing Dr. Zagal's
2 direct binder, we noticed that there are certain images
3 from the Create a Superstar feature where -- as you heard
4 Mr. Friedman, during his opening -- talk about Randy
5 orton's tattoos appearing on the Create a Superstar
6 feature.

7 We asked Mr. Friedman whether he was going to use
8 these exhibits and he indicated he was not, but that Dr.
9 zagal would be testifying to that. He has no disclosure of
10 that in his expert report and so --

11 THE COURT: No disclosure of what?

12 MR. SIMMONS: Of talking about the use of Randy
13 orton's tattoos on this Create a Superstar feature.

14 THE COURT: He doesn't have to disclose -- so, he
15 -- when I took up your motion to exclude -- your *Daubert*
16 motion as to his testimony -- I don't remember the
17 specifics but as you know, he simply has to disclose his
18 opinions, what he reviewed, and the bases for those
19 opinions. He doesn't have to disclose what he's going to
20 use during his testimony. So, I'm not -- you need to be
21 clear about what it is that you are claiming he did not
22 disclose.

23 MR. SIMMONS: Yes, Your Honor. He didn't disclose
24 that that was a basis for his opinions. And he didn't say
25 -- and he has new opinions that relate to the use of Randy

1 Orton's tattoos on the Create a Superstar. So, there is no
2 basis and no opinions disclosed.

3 THE COURT: Mr. Simon? Or Mr. Friedman?

4 MR. FRIEDMAN: Thank you, Your Honor.

5 Dr. Zagal disclosed that the artwork and the
6 tattoos appeared in the video games. He reviewed the video
7 games and discussed them across three expert reports.

8 THE COURT: And that's my understanding. He did
9 review that his opinions were in part based upon the images
10 that appeared in the video games. And I took up your
11 motion where you sought to exclude any reference to the
12 Superstar feature and I have ruled on that. This seems to
13 be an extension of that, so your objection is denied.

14 MR. SIMMONS: Understood, Your Honor.

15 We had -- the parties, unfortunately -- you had
16 asked us not to have -- or hoped we didn't have disputes
17 until --

18 THE COURT: I'm sorry, sir. The other thing is
19 that you need to --

20 MR. SIMMONS: Sorry.

21 THE COURT: Because you are not really being picked
22 up on the microphone.

23 MR. SIMMONS: I'm sorry.

24 I was just going to alert the Court, there are
25 three other disputes the parties have for other witnesses

1 in the course of the day.

2 THE COURT: We're starting at 9:00 with --

3 MR. SIMMONS: Understood.

4 THE COURT: Yes. So, we will -- you need to let us
5 know what those -- let Michelle know what the disputes are,
6 what the nature of the disputes are, and I'll figure out
7 when we take them up. But we're not going to take them up
8 now.

9 MR. SIMMONS: Understood.

10 THE COURT: Okay. All right.

11 MR. SIMON: Your Honor, would you like Dr. Zagal to
12 take the witness stand?

13 THE COURT: He may go ahead and take the stand.

14 (Proceedings continued in open court, jury
15 present.)

16 THE COURT: Good morning, ladies and gentlemen.

17 Mr. Friedman, are you ready to proceed?

18 MR. FRIEDMAN: Yes, Your Honor.

19 THE COURT: Okay. Dr. Zagal, you are still under
20 oath, sir.

21 THE WITNESS: Thank you.

22 MR. FRIEDMAN: Thank you, Your Honor.

23 Good morning, ladies and gentlemen of the jury.

24 * * * * *

25 JOSE ZAGAL,

1 having been previously duly sworn, was examined and
2 testified as follows:

3 DIRECT EXAMINATION

4 BY MR. FRIEDMAN:

5 Q. Good morning, Dr. Zagal.

6 A. Good morning.

7 Q. When we concluded your testimony yesterday, we were
8 talking about the importance of the tattoos to the video
9 games, the importance of the tattoos to Mr. Orton and, and
10 their ability to create realism and authenticity in the
11 video games. Okay? Do you remember that?

12 A. Yes. That's correct.

13 Q. Okay. My question to you, Dr. Zagal, is: Does the
14 degree of realism in the WWE 2K Games have an effect on the
15 sales of the video games?

16 A. Yes, I believe it does.

17 Q. How so?

18 THE COURT: Hold on for a second.

19 (Off the record.)

20 THE COURT: Okay. We're missing a juror. So,
21 let's stop.

22 COURTROOM DEPUTY: He's coming in.

23 (Proceedings continued in open court, Juror No. 8
24 now present.)

25 THE COURT: Why don't you restate your first

1 question?

2 MR. FRIEDMAN: Thank you, Your Honor.

3 Q. (BY MR. FRIEDMAN) Dr. Zagal, does the realism or
4 authenticity displayed in the WWE 2K series of games have
5 an effect on the sales of the video games?

6 A. Yes, it does.

7 Q. How so?

8 A. So, it goes to these factors of what the fans
9 expect and what the franchise is all about, and the game
10 needs to reflect sort of the spirit, the idea of the
11 franchise, and be authentic to that. In that sense, the
12 fans have a lot of expectations regarding the realism in
13 terms -- in how the game characters are portrayed and
14 whether they look or not like their real-life counterparts.

15 Q. Dr. Zagal, Mr. Orton has fairly prominent and
16 recognizable tattoos, wouldn't you agree?

17 A. Yes, I would agree.

18 Q. Are these tattoos an important part of his persona?

19 A. Yes, they are.

20 Q. Are they parts of his persona that are commented
21 upon by critics and fans alike?

22 A. Yes, his tattoos get a lot of attention from both
23 fans and, and even the WWE itself.

24 Q. Dr. Zagal, do you have your exhibit binder in front
25 of you?

1 A. I do.

2 Q. Would you turn to Plaintiff's Exhibit 25, please?

3 (Pause.) Dr. Zagal what is displayed at Plaintiff's
4 Exhibit 25?

5 A. So, this is a printout of a web page. And the web
6 page is from the WWE.com website.

7 Q. Is this something that you found in the course of
8 your studies and review of this case?

9 A. Yes, I found it myself.

10 Q. What is the topic of this article?

11 A. Can I read the title?

12 Q. Yes. What is the title of the article?

13 A. So, the title of the article is: "The 20 Coolest
14 Tattoos in WWE History." And there's a couple paragraphs
15 underneath that.

16 Q. And did -- I'm sorry. And did you say this came
17 from the WWE website?

18 A. Yes.

19 Q. Okay. Dr. Zagal, is this an article -- one of the
20 articles that you reviewed and that helped to form the
21 basis of your opinions today?

22 A. Yes, it is.

23 Q. Okay.

24 MR. SIMMONS: Your Honor, I'd move for admission of
25 Plaintiff's Exhibit 25 and for publication to the jury?

1 MR. FRIEDMAN: No objection, Your Honor.

2 THE COURT: Plaintiff's Exhibit 25 is admitted and
3 it may be published.

4 Q. (BY MR. FRIEDMAN) Dr. Zagal, tell us -- in the
5 main -- what is this article about?

6 A. So, this article is an article written by someone
7 at the WWE or paid for by the WWE -- so, someone paid to
8 write this article -- where they have sort of gone over all
9 of their superstars and athletes and wrestlers and
10 identified 20 of them that have the most interesting,
11 exciting, prominent, or coolest -- as the article's title
12 says -- tattoos.

13 Q. In the context of your opinions and what you have
14 been discussing yesterday and will discuss today with the
15 jury, what is the significance of this article?

16 A. So, this article shows that if we think of the WWE
17 universe and experience and try to unpack a bit what that
18 means, it basically provides evidence to support what I'm
19 saying here, is that tattoos are an important part of WWE;
20 that WWE values them, they think they're interesting, they
21 think they're worth highlighting when their athletes have
22 them, they think they are worth commenting on.

23 And this then, obviously, impacts the video games
24 and explains in part why the athletes would have to show up
25 in the video games with their tattoos and their character

1 -- game characters of these athletes would have the tattoos
2 -- why also in the games themselves there are features that
3 allow players to add body art, tattoos to game characters,
4 game characters of their own creation, and why they can
5 also modify them in the game characters of the actual
6 athletes, as well.

7 Q. Is the WWE Superstar Randy Orton featured on this
8 Top 20 list?

9 A. Yes, he is.

10 Q. What rank is he?

11 A. I believe he's No. 5 along the list.

12 MR. FRIEDMAN: Mr. Zidzik, could you turn to page
13 17 of Exhibit 25, please?

14 Q. (BY MR. FRIEDMAN) Dr. Zagal, you can --

15 A. So, I'm not seeing anything on my screen. I don't
16 know if that's --

17 Q. It's also in your binder.

18 A. Yes.

19 Q. Just in case. Dr. Zagal, Mr. Orton is ranked No. 5
20 in this article of the coolest tattoos on the WWE website.
21 Is that fair?

22 A. Yes. That's what was on the website.

23 MR. FRIEDMAN: And can we display page 17.

24 Q. (BY MR. FRIEDMAN) Dr. Zagal, which of Mr. Orton's
25 tattoos are featured as the coolest in the WWE?

1 A. So, specifically the title of his entry says,
2 "Randy Orton, Tattoo: Tribal design. Location: Back and
3 shoulders."

4 And we can see the picture of Randy Orton showing
5 the back tattoo and his shoulders, and the back of his
6 arms, obviously.

7 Q. Based on this article and other materials that you
8 reviewed, and your background, education, and experience,
9 do you have an opinion whether the Orton character in the
10 Take-Two video game would be perceived by fans as less
11 authentic if he appeared in the games without his tattoos?

12 A. Absolutely. I think the fans would notice that his
13 tattoos are -- let's imagine that he would -- like, if the
14 video game character had different tattoos? The fans would
15 notice that. Or if he had no tattoos, the fans would also
16 notice that.

17 Q. Thank you.

18 MR. FRIEDMAN: Mr. Zidzik, you can take that down.

19 Q. (BY MR. FRIEDMAN) Dr. Zagal, we have been talking
20 a lot about these video games and we have seen some videos
21 from them, too. Have you played each of the 2K16, 17, and
22 18 video games?

23 A. Yes, I have.

24 Q. And did you prepare some gameplay to walk the jury
25 through some of the elements of the video game?

1 A. Yes. I'm prepared to play the games and also show
2 some videos of recorded gameplay that --

3 Q. You say you are prepared to play the video games?

4 A. Yes.

5 Q. Okay.

6 A. That's a new one for me, in court.

7 Q. Dr. Zagal, do you have Plaintiff's Exhibit 46 in
8 front of you?

9 MR. FRIEDMAN: Your Honor, may I approach?

10 THE COURT: Yes.

11 A. Yes, I do.

12 Q. (BY MR. FRIEDMAN) Can I have it?

13 Dr. Zagal, I have actually taken Plaintiff's
14 Exhibit 42 from you.

15 MR. FRIEDMAN: With the Court's permission, I'd
16 like to insert this video game into our Xbox in order to
17 play it for the jury. This Exhibit 42 has already been
18 admitted.

19 MR. SIMMONS: Your Honor, no objection at this
20 time.

21 MR. FRIEDMAN: Thank you.

22 Your Honor, permission to approach?

23 THE COURT: Yes.

24 Q. (BY MR. FRIEDMAN) Dr. Zagal, I'm handing you an
25 Xbox One video game controller. I've inserted the WWE 2K16

1 game into the Xbox on counsel table.

2 Dr. Zagal, could you show the jury some of the
3 aspects of this video game and, and narrate while you do?

4 A. Sure.

5 Q. What are we looking at now, for example?

6 (Video playing.)

7 MR. SIMMONS: Objection, calls for a narration,
8 Your Honor.

9 THE COURT: Can we have a sidebar, please?

10 (Proceedings continued at the bench.)

11 THE COURT: The objection is that it calls for a
12 narration, which it does. But if this is a demonstration,
13 the narration is necessary.

14 I guess I need to understand, Mr. Friedman, what
15 actually are we doing here? What is the witness
16 demonstrating? What is he going to do? What is -- what is
17 he attempting to demonstrate and show to the jurors?

18 MR. FRIEDMAN: Thank you, Your Honor. He is going
19 to go through the first menu screen. He's going to find
20 the Custom Character creator and he's going to apply the
21 tattoos onto a Custom Character.

22 Then he's going to use that Custom Character to
23 engage in a battle with the Mr. Orton character. It will
24 take approximately four or five minutes. I can ask him
25 questions while he goes through it, rather than have him

1 narrate. But given he's playing the game and demonstrating
2 the gameplay, I thought it would be appropriate that he
3 could narrate and demonstrate as he is going along.

4 THE COURT: And what are we showing here? Are we
5 doing all this to simply show the images on the Superstar
6 character?

7 MR. FRIEDMAN: That's correct, both on the
8 Superstar Custom Character and on Mr. Orton. And to show,
9 in context, how the artwork is used throughout the game in
10 a couple instances.

11 THE COURT: Okay. The objection to the narration
12 is overruled.

13 (Proceedings continued in open court, jury
14 present.)

15 (Video playing -- loud background music.)

16 THE COURT: Nobody's going to hear him narrate
17 anything. I didn't know if we were in court or in the
18 club, counsel.

19 MR. FRIEDMAN: This is a little early in the
20 morning for something like this.

21 THE COURT: Yeah, I'm awake. Okay, you ready?

22 MR. FRIEDMAN: I think that's good. Thank you.

23 Q. (BY MR. FRIEDMAN) Dr. Zagal, could you take us
24 through a little bit of the gameplay of the 2K16 game.

25 MR. FRIEDMAN: And just to orient the jury, Dr.

1 Zagal is going to go through some of the initial menu
2 screens, he's going to find a Custom Superstar and apply
3 tattoos to it, and then he is going to engage in a battle
4 with the Orton character.

5 Q. (BY MR. FRIEDMAN) Dr. Zagal, please proceed and
6 explain what you are doing.

7 A. Okay. So this is the -- basically, the start
8 screen, letting me know that there's issues of being --
9 there's a warning. I'm going to just skip past by pressing
10 a button.

11 THE COURT: Hold on for a second. Let's pause.
12 (Off the record.)

13 THE COURT: Everybody just relax for a second,
14 stretch your legs. We're going to get this technology
15 aspect figured out.

16 MR. FRIEDMAN: Thank you, Your Honor. This is a
17 first for me. We can proceed without any sound if we are
18 able to mute it, but I have been informed by Technology
19 that we can't do that at counsel table.

20 THE COURT: We are -- just pause. We're having our
21 IT person come up and see if they can figure out how to
22 mute the music.

23 (Off the record.)

24 Q. (BY MR. FRIEDMAN) Dr. Zagal, there might be some
25 annotations on your screen. If you could press the lower

1 left corner of your screen to clear those?

2 A. Yes. (Complies.)

3 Q. Thank you.

4 A. Okay.

5 Q. And sorry for the technical troubles. It looks
6 like it was my monitor here that was causing the issue.

7 Dr. Zagal, you are on the menu screen. Could you
8 please proceed?

9 (Video playing.)

10 A. This is the menu screen. Here we can see there are
11 options for playing the game. This is sort of "Basic" play
12 option;

13 "My Career," which is where you can create your own
14 wrestler and play their career; and,

15 over here there's a "Creations" menu, which is
16 where you can go in and actually create your wrestler or
17 make changes to existing wrestlers;

18 "Online" obviously isn't working.

19 So, I'm going to go into the Creations menu here.
20 I'm going to pick to Create a Superstar, which is the one
21 that's currently selected. But I can move around and pick
22 the different ones.

23 So, there's options here to Create a Custom
24 Superstar or a Custom Diva. Those are the two options on
25 the top. I can go down and then also make changes to --

1 see the existing Superstars and Divas or edit my own
2 version, as well.

3 Q. Dr. Zagal, if I could ask you in the context of the
4 2K16 video game, what is a Custom Superstar?

5 A. A Custom Superstar is a Superstar that I have
6 created. So, it could be -- I could try to make a version
7 of myself in the game, if I wanted, like a character that
8 looks like me or someone completely invented.

9 Q. And would that allow you to play that character
10 throughout the course of the game, throughout its
11 storylines and matches?

12 A. Yes. In specific play modes, you can play with
13 your own -- your own character, essentially.

14 Q. Thank you.

15 A. So, this is the menu for that. And by default, I
16 am given this, this character, I'll call it. We think of
17 it like a mannequin. So, sort of generic. It doesn't have
18 any sort of specific features. As you can see here, it
19 gives you options for editing the face, the body, and so on
20 and so forth.

21 So, you can pick the body here. And so you can
22 see, I can -- I'm not going into the menu. It's just for
23 -- in the interest of time, you can change its height, make
24 the character look more muscley, less muscley, taller,
25 heavier, and so forth.

1 select the clothing now. So, there's different
2 masks and piercings. Lots of different options -- I'm
3 going down -- glasses, hats, so on.

4 Different face parts, colors, eyebrows, all these
5 kinds of things. Let's go back a bit here.

6 Q. Can you also apply tattoo art to the custom
7 characters?

8 A. Yes. So, I went into "body" again and "parts" and
9 here we can see -- in this game they are calling it "body
10 art." In this case, for different body locations, I can
11 select body art on the back. There's different options for
12 design. I'm going to pick "body art." And here's a bunch
13 of different options. I'm going to select this one.

14 Q. Dr. Zagal, the tattoo that you selected to apply to
15 the upper back of your mannequin, is that one of the
16 copyrighted artworks that are at issue in this case?

17 A. Yes. I'm going to accept that body part, that
18 tattoo. I'm going to add art to the left arm. Again,
19 there's lots of different options. Select this one and
20 accept it. (Demonstrating.)

21 Q. Dr. Zagal, the artwork that you just selected to
22 put on the left arm of the mannequin that you are creating,
23 are those also two additional artworks that are the subject
24 of this action?

25 A. Yes. We can see the dove and the rose, for

1 example.

2 Q. And the tribal on the upper arm there?

3 A. Mm-hmm.

4 Q. Did you say yes?

5 A. Yes. I'm sorry.

6 Q. And what are you doing now?

7 A. I am selecting body art in this case for the right
8 arm.

9 Q. And what you selected there looks like the skull
10 sleeve and tribal. Is that also the artwork that are at
11 issue in this case?

12 A. Yes. I'm going to accept that.

13 So, another feature this game has -- if I press the
14 stick here -- it goes into a special sort of camera mode,
15 and I can rotate this mannequin to which I have applied
16 these tattoos. I can zoom in, if I want to get more
17 detail. (Demonstrating.) Oops. Sorry.

18 Q. Dr. Zagal, when you are zooming in, can you show
19 close-up views and details of the artwork on your custom
20 created mannequin's back and arms?

21 A. Yes.

22 Q. Can you demonstrate some of that for the jury?

23 A. Yes. So, I'll spin around so you can see behind
24 the arms. (Demonstrating.) You can spin around a little
25 bit here. (Demonstrating.) Zoom out.

1 Q. Dr. Zagal, will you zoom in on the dove tattoo?

2 A. Sure. (Complies.) You can see the rose there.

3 Q. So, Dr. Zagal, now you have created a Custom
4 Superstar. What are you able to do with this Custom
5 Superstar in the game?

6 A. I can use this Custom Superstar to play the game.

7 Q. Could you demonstrate that to the jury?

8 A. Sure. I'm going to go back, come down here and
9 accept. I'll accept all the changes I made to my Custom
10 Superstar. I'm going to go back to the main menu. I'm
11 just going to select "play" here and play in a one-on-one
12 match. There's also a few different options. Let's pick
13 the "table" one. (Demonstrating.)

14 Q. Dr. Zagal, as you are proceeding through the menus
15 and the loading screen is going, are you prepared to play a
16 battle in the 2K16 game right now?

17 A. I'm prepared to lose a battle, how about that?

18 Q. Can you play to lose?

19 A. Yes, I can play to lose.

20 Q. Okay, please do.

21 A. Okay. So, I'm going to pick for myself one of my
22 Custom Superstars. And it says "new" because there's a new
23 one that I just created. Maybe it's -- there we go. And
24 then I'm going to pick a Superstar to play against.

25 Q. You are choosing your opponent?

1 A. Yes. (Demonstrating.)

2 Q. And you have selected Randy Orton as your opponent?

3 A. I did. I selected Randy Orton. You can kinda tell
4 the one on the left is a mannequin, doesn't look quite like
5 a real person does. And you can tell on the right, it's --
6 that's a photograph -- or came from -- the image came from
7 a photograph. "Start match."

8 Q. That's on the menu screen; correct?

9 A. Yes.

10 Q. Okay.

11 A. You can see that in bigger detail. (Pause.) The
12 game is currently loading, so. (Pause.)

13 I'm going to try to run away. (Demonstrating.)

14 THE COURT: Okay. He's not going to narrate the
15 battle, right?

16 Q. (BY MR. FRIEDMAN) Dr. Zagal, you don't need to
17 narrate the battle.

18 A. Okay.

19 Q. But go ahead and play to lose. You're the
20 character that's -- whose back is facing us; correct?

21 A. That is correct. I am controlling the --

22 Q. And throughout this gameplay, are the tattoos both
23 on the Orton character and your Custom Character visible?

24 A. Yes, they are both visible and, and the same.

25 (Demonstrating.) Okay, I had to get one hit in.

1 Q. Dr. Zagal, I think that's sufficient.

2 MR. FRIEDMAN: Mr. Zidzik, you can turn off the
3 Xbox.

4 Q. (BY MR. FRIEDMAN) Well played, Dr. Zagal.

5 Dr. Zagal, have you also created videos of gameplay
6 for the 2K16, 17, and 18 gameplays to further explain your
7 opinions to the jury?

8 A. Yes, I have.

9 Q. Now, that implies that you are able to record
10 gameplay from the -- from the video game. Is that
11 accurate?

12 A. Yes, that's a -- the Xbox has that feature and
13 allows you to record directly. You can also take
14 screenshots and things like that.

15 Q. Thank you. And in addition, were you able to take
16 any screenshots to illustrate some of the instances in
17 which the tattoos appear in the 2K video games?

18 A. Yes.

19 Q. Okay. Dr. Zagal, what we saw when you were playing
20 the match against Randy Orton, was that gameplay or was
21 that photography?

22 A. That was gameplay. All the images there were
23 generated by -- I'll call it the computer, the game console
24 in this case, based on software code and -- the term of the
25 art is sort of -- there are 3D models.

1 So, to give you an idea of what a 3D model is, I'm
2 going to assume that you are familiar with chocolate Easter
3 bunnies? So there's -- let's imagine a really big one,
4 right? 3D models like the chocolate Easter bunny without
5 the wrapping. It's hollow. There's nothing in the middle.
6 Right? There's nothing inside. It's just an outside
7 layer. And there's these textures that are applied to the
8 outside to dress it up, so it doesn't look blank, as it
9 were.

10 So, in this case, that's an image that's generated
11 by the game itself. It's not based on footage of any
12 wrestler. And they usually, because there are so many
13 wrestlers, what they'll do is they'll use sort of a generic
14 model and then resize it, depending on if the wrestler is
15 taller, wider, and so on and so forth.

16 Q. Thank you, Dr. Zagal.

17 Dr. Zagal, you mentioned that you prepared some
18 video gameplay. And have you reviewed Plaintiff's Exhibit
19 153?

20 A. Yes.

21 Q. Okay. What is Plaintiff's Exhibit 153?

22 A. A video gameplay.

23 Q. Okay. From the 2K16 game?

24 A. Yes.

25 MR. FRIEDMAN: Your Honor, I'd move for admission

1 of Plaintiff's Exhibit 153 and to publish a portion of it
2 to the jury.

3 THE COURT: Any objections?

4 MR. SIMMONS: No, Your Honor.

5 THE COURT: Plaintiff's Exhibit 153 is admitted and
6 may be published.

7 MR. FRIEDMAN: Thank you, Your Honor.

8 Mr. Zidzik, could you please pull up Plaintiff's
9 Exhibit 153 and play a portion of it, starting at 3 minutes
10 and 13 seconds.

11 THE WITNESS: Could we show something from the
12 beginning?

13 MR. FRIEDMAN: Yes.

14 Mr. Zidzik, could you start Plaintiff's Exhibit 153
15 at the beginning?

16 (Video playing.)

17 Q. (BY MR. FRIEDMAN) Dr. Zagal, what are we seeing on
18 this screen?

19 A. If we could pause there? (Pause.) So, that's sort
20 of the start-up screen. And yesterday, I mentioned how
21 game companies will often license stuff from other
22 companies, their IP. So, here is a list essentially of
23 different kinds of licenses that are in this game.

24 The ones at the top all have to do with the WWE.
25 They're basically saying that the trademark, logos,

1 copyrights having to do with the wrestling characters and
2 their names and so on are part of WWE.

3 And further down, there's other licenses. We can
4 see Terminator movies and Terminator 2. I believe there's
5 a special -- a special expansion for this game where you
6 could play as, I believe, as the Terminator from the
7 movies.

8 And some of the other licenses there are specific
9 to technology that's being used in this game.

10 Q. Are these examples of the licensed IP in video
11 games that you were talking about yesterday?

12 A. Yes.

13 Q. Thank you.

14 MR. FRIEDMAN: Mr. Zidzik, could you advance to
15 3 minutes and 13 seconds, approximately.

16 (Video playing.)

17 Q. (BY MR. FRIEDMAN) Dr. Zagal, what are we seeing in
18 this portion of Plaintiff's Exhibit 153?

19 A. So, in some of the matches you get these animated
20 entrances where you see the wrestler enter the ring. In
21 this case, we're seeing the character of Andy Orton -- I'm
22 sorry -- Randy Orton -- my mistake. And he's sort of
23 walking around and strutting and the narrators are
24 commentating and they're saying how great a wrestler he is
25 and commenting on his attitude and his experience, and so

1 on.

2 On the other side there, we can briefly see there's
3 another wrestler. In this case, it's a custom wrestler
4 that I created. And this is happening as sort of getting
5 ready to play the game and to make the match more exciting,
6 like you would see on the television broadcast. So,
7 they're sort of mimicking that.

8 In the background, we're seeing a crowd. Not very
9 realistic. They are sort of animated characters, but
10 animated with less quality.

11 And in the back, we can actually see some video
12 footage of Randy Orton in his actual sort of in-person
13 performances in the back.

14 Q. Now, the video that we are seeing now, Mr. Orton --
15 or the Orton character entering the ring, is that gameplay
16 or is that video footage?

17 A. So, it's not game from the sense that I'm --
18 there's no one controlling this character; he sort of plays
19 automatically. But it's generated by the game. I'll call
20 that game engine footage or generated by the game engine,
21 rather than footage from a video recording that was made
22 elsewhere.

23 Q. Thank you, Dr. Zagal.

24 And just to conclude on this video, the custom
25 playable character appears to have different color tattoos

1 on his arms. What's going on there?

2 A. So, that's a Custom Character that I created using
3 the tattoos I showed you earlier today. As an additional
4 option, I could change the colors to make them, well, in
5 this case, look uglier, to be honest. But you can modify
6 in this case the colors specifically, you can add some, add
7 some -- a few effects that I did not show in my
8 demonstration earlier.

9 Q. Thank you, Dr. Zagal.

10 MR. FRIEDMAN: Mr. Zidzik, you can take down that
11 video, please.

12 Q. (BY MR. FRIEDMAN) And, Dr. Zagal, you did the same
13 thing -- did you do the same thing with the 2K17 and 18
14 games, where you created videos of some of the gameplay in
15 order to illustrate what's happening in those games with
16 the jury?

17 A. Yes, I did.

18 Q. Is Exhibit 154 one of those?

19 A. Yes.

20 MR. FRIEDMAN: Your Honor, I'd move for admission
21 of Exhibit 154, and to publish a portion of it to the jury.

22 MR. SIMMONS: Your Honor, no objections.

23 THE COURT: Plaintiff's Exhibit 154 is admitted and
24 may be published.

25 Q. (BY MR. FRIEDMAN) Dr. Zagal, we are looking at

1 Plaintiff's Exhibit 154. Is this recorded video gameplay
2 that you created from the 2K17 video game?

3 A. This is.

4 Q. Okay.

5 MR. FRIEDMAN: Mr. Zidzik, could you skip to about
6 8 minutes and play?

7 (Video playing.)

8 Q. (BY MR. FRIEDMAN) Dr. Zagal, what are we viewing
9 at 8 minutes on Exhibit 154?

10 A. So, this is a camera mode in the editor for the
11 game. In this case, the wrestler that's been selected is
12 Randy Orton's character for the game. And you can move the
13 camera around like before, to see all the tattoos and the
14 -- what he looks like in the games, like what his character
15 looks like.

16 Q. And similarly, can you zoom in on the tattoos to
17 see them in even greater detail?

18 A. Yeah, you can zoom in. You can rotate the camera
19 also in different directions. You can see him from up
20 above. For this game, the camera controls are a bit more
21 sophisticated. There's a few more options. You can also
22 pan your way -- you can get in pretty close in this game.

23 Q. Thank you, Dr. Zagal.

24 MR. FRIEDMAN: Mr. Zidzik, you can take down
25 Plaintiff's Exhibit 154.

1 Q. (BY MR. FRIEDMAN) Dr. Zagal, did you create
2 Plaintiff's Exhibit 155 of your gameplay in the 2K18 game?

3 A. Yes, I did.

4 MR. FRIEDMAN: Your Honor, I'd move for admission
5 of Exhibit 155 and to publish a portion of it to the jury.

6 THE COURT: Any objections?

7 MR. SIMMONS: No, Your Honor.

8 THE COURT: Plaintiff's Exhibit 155 is admitted and
9 may be published.

10 MR. FRIEDMAN: Mr. Zidzik, could you play a portion
11 of Exhibit 155 starting at about 4 minutes.

12 (Video playing.)

13 Q. (BY MR. FRIEDMAN) Dr. Zagal, what are we seeing in
14 this video?

15 A. This is an in-game match. It's Seth Rollins versus
16 Randy Orton.

17 Q. And this is from the 2K18 game?

18 A. Yes.

19 Q. All right. Are the tattoos on the Orton character
20 visible during gameplay like this?

21 A. Yes, they are. And in actual gameplay, the quality
22 is better. The video's a bit, um, sort of laggy in some
23 ways.

24 Q. When you are referring to the video, you are
25 referring to the video that you created of the gameplay?

1 A. Yes, the video that we are watching right now. Or
2 at least on my screen, there's a bit of ghosting.

3 Q. Okay.

4 A. Yeah, and the images we are seeing here, again,
5 were created by the game engine. They are not created from
6 direct footage of any of Mr. Orton's sort of live events.

7 Q. Thank you, Dr. Zagal.

8 MR. FRIEDMAN: Mr. Zidzik, you can remove that from
9 the screen.

10 Q. (BY MR. FRIEDMAN) Dr. Zagal, we have talked about
11 realism, we have talked about authenticity, and that the
12 more realistic, the better it is for sales; correct?

13 A. Yes.

14 Q. Okay. And about your opinions that the tattoos in
15 the video games give the Orton character a level of realism
16 and authenticity; right?

17 A. Yes.

18 Q. Okay.

19 A. They make the character more realistic.

20 Q. All right. Now, do you have an opinion whether the
21 defendants copied the plaintiff's five tattoos into the
22 video games?

23 A. Yes. They were --

24 Q. Is that opinion --

25 A. -- copied.

1 Q. I'm sorry. What is that opinion?

2 A. Yes, they were copied.

3 Q. Dr. Zagal, you created those videos that we just
4 watched from gameplay. Can normal players, consumers of
5 these video games, also record their gameplay?

6 A. Yes. They do it all the time. There is a couple
7 services that actually make it really easy to not only
8 create videos of a gameplay, but also share 'em widely on
9 the internet. There's -- one particular website is known
10 as Twitch. It's used for game streaming, where people will
11 play their games live and they'll have people in the chat
12 commenting, and so on. YouTube is also a very popular site
13 for uploading and posting videos of gameplay.

14 Q. And that's how you created the videos that we just
15 showed the jury, by recording the gameplays, any consumer
16 would?

17 A. Yes. There's no special hardware is required to do
18 this. It's -- it comes out of the box, essentially.

19 Q. Dr. Zagal, do you have an opinion whether the
20 inclusion of the five tattoos in the video games was a
21 deliberate design choice?

22 A. Yes. So --

23 Q. Go ahead.

24 A. When you are creating a video game, you basically
25 have to create everything from scratch unless, let's say,

1 you have licensed some sort of technology that you might be
2 using to help you. But all the content in the video game
3 is put there very deliberately. Right? It's a game design
4 decision whether or not to include a certain feature.

5 Adding features costs time and, and money,
6 obviously. You have to pay one of your employees to work
7 on this feature; it needs to be tested, it needs to be
8 verified, and so on and so forth.

9 So, everything in the game comes from a decision.
10 At some point, someone said, *well, we need to add some more*
11 *camera controls*, or, *we need to add a new character*, and,
12 *we need to add a new option to -- more hats for our*
13 *wrestlers*, and so on and so forth. So, everything is
14 deliberate and designed. And game companies are,
15 obviously, under a lot of pressure to make these games, to
16 not run over in terms of schedule, in terms of budget, and
17 so on.

18 For these games specifically, they're coming out
19 yearly. And so, if we sit down and said, *Hey, we have this*
20 *really cool idea we want to add to the game*, and it turns
21 out that it will take us -- it will take two months to
22 implement that, test it, and get it in the game. We might
23 -- we might run over, past our schedule, and now the game
24 is coming out after the year it's supposed to be, for
25 example.

1 So, game companies are very deliberate in that
2 sense. And the choice to add is --

3 THE REPORTER: Excuse me. Please repeat that.

4 A. So, the game companies are very deliberate -- my
5 apologies -- in terms of what should they add, what should
6 they not add, what should they remove. And sometimes they
7 choose to remove features that might have been present in
8 an earlier year because, let's say, players might not have
9 liked them or they were too buggy or they didn't add value
10 to the game, for example.

11 Q. (BY MR. FRIEDMAN) Dr. Zagal, do you have an
12 opinion whether a portion of the sales and profits of the
13 2K video games are attributable to the five tattoos?

14 A. Yes.

15 Q. What is that?

16 A. And the connection is, the game company --

17 THE COURT: Excuse me for a second.

18 Dr. Zagal, I'm going to ask you, slow down a little
19 bit.

20 THE WITNESS: Okay.

21 THE COURT: You speak rapidly, but Chris's head is
22 about to blow up.

23 THE WITNESS: Okay.

24 THE COURT: And it won't be caught on video. So,
25 slow down a little bit.

1 THE WITNESS: Yes. My apologies.

2 THE COURT: You're welcome, Chris.

3 THE REPORTER: Thank you, Judge.

4 THE WITNESS: My students also have this issue.

5 Q. (BY MR. FRIEDMAN) You have heard that critique
6 before, huh?

7 A. I have heard it before from my students, so.
8 I'm sorry, could you repeat the question?

9 Q. Yes. I asked you whether you had an opinion
10 whether a portion of the sales and profits of the video
11 games are attributable to the five tattoos?

12 A. So, yes, I do. And it's a sequence, in a sense.
13 So, the game company has decided that they want the
14 character of Randy Orton in their game. They know the
15 character needs to look the way Randy Orton, the real
16 person, looks like in the real life. In order to do so,
17 they need to make sure he shows up in the game with the
18 tattoos. And they need to look the way they look in -- on
19 the character, they need to look the way they look in real
20 life.

21 why would they choose to include Randy Orton in
22 their game? Well, because he's an important star in the
23 WWE. He's a big star. He has a long history, long
24 successful history, too. He's won many championships. I
25 believe the most recent one, at least when I began my

1 research, was the 2018 American Championship.

2 And so, in order to have Randy Orton as a character
3 in the game, he needs to look right. He needs to have his
4 tattoos. And so, in that sense there is a driver. Right?
5 They have added him because they expect to sell more copies
6 because of that. Or they expect to not sell fewer copies.
7 If fans are upset that he is not in the game, then they
8 would not buy the game.

9 Q. Dr. Zagal, have you done an analysis of how much
10 the video games' sales or profits are attributable to the
11 copyrighted tattoos?

12 A. No, I have not done that analysis.

13 Q. Why not?

14 A. I was not asked to.

15 Q. Dr. Zagal, video games are similar to computer
16 programs. Is that fair?

17 A. I'd say they are computer programs, for the most
18 part.

19 Q. Do video games take up a certain amount of hard
20 drive space or storage space?

21 A. Yeah, so there's assets and files that need to be
22 downloaded and installed on the device.

23 Q. In order to find out how important the tattoos are
24 to the video games, couldn't you just calculate the
25 percentage of the hard drive that is taken up by the copied

1 artwork and then compare that to the amount of storage
2 space the entire game takes up?

3 A. I don't think it would make sense to do that.

4 Q. Why not?

5 A. Because they're two unrelated things. It would
6 sort of be like saying how much is a certain word worth in
7 a book by counting how many words the book has in total.
8 When, in this case, we have a video game that has lots of
9 characters, it has lots of software code, lots of assets.

10 But what really matters is, *How important is this*
11 *character to the game?* Not all the characters in the game
12 are equally valuable in that sense. They're not all
13 equally important. And so, it's not about the file sizes,
14 it's about the significance that this character and this
15 character's tattoos have to the game and the game sales.

16 Q. Dr. Zagal, from a video game development
17 perspective, if Take-Two wanted to remove the tattoos or
18 cover them up or modify them on the Orton character, is
19 that technically feasible?

20 A. Just based on what we see in the games and the
21 level of quality they achieve, it's not only feasible but I
22 think it would be pretty easy for them to do so.

23 Q. So, they could have done that?

24 A. Yes, they could have done that.

25 Q. And could Take-Two have included the Orton

1 character or other characters without their tattoos at all,
2 and still kept the characters in?

3 A. Yes, absolutely.

4 Q. Okay. Dr. Zagal, do you think your colleagues will
5 have an opinion about your testimony today?

6 A. My colleagues? Yes.

7 MR. SIMMONS: Objection, Your Honor.

8 THE COURT: Sustained.

9 Q. (BY MR. FRIEDMAN) Dr. Zagal, I have no additional
10 questions. Thank you very much.

11 A. Thank you.

12 Q. At this time.

13 MR. SIMMONS: Your Honor, may I proceed?

14 THE COURT: Yes.

15 CROSS-EXAMINATION

16 BY MR. SIMMONS:

17 Q. Good morning, Dr. Zagal.

18 A. Good morning.

19 Q. We have met before, right?

20 A. I believe so.

21 Q. I had the opportunity to ask you some questions in
22 this case and you answered them under oath?

23 A. If you are referring to my deposition then, then
24 yes.

25 Q. Now, you offered some opinions on direct and I'd

1 like to go through a few of them, if that's okay.

2 THE COURT: I'm sorry. Hang on for one second,
3 counsel.

4 Stacie, is there any way to turn that mic up at the
5 podium?

6 MR. SIMMONS: I can also try to speak louder, if
7 that helps.

8 (Off the record.)

9 Q. (BY MR. SIMMONS) So, I'd like to talk about a few
10 of your opinions that you talked about on direct. Now, one
11 of your opinions that you ended with was that profits from
12 these games are attributable to Mr. Orton's tattoos. Do
13 you remember that?

14 A. To his tattoos, yes.

15 Q. Now, you admit that people don't buy WWE 2K because
16 of the tattoos; right?

17 A. I believe I said that in my deposition, yes.

18 Q. Okay. And you aren't aware of anyone who purchased
19 WWE 2K because of one of Mr. Orton's tattoos; right?

20 A. Specifically for the tattoos, that is correct.

21 Q. In fact, you haven't analyzed Mr. Orton's tattoos
22 separately, have you?

23 A. I have not.

24 Q. So, you haven't analyzed the tattoos that Miss
25 Alexander inked separately from the ones inked by other

1 tattoo artists; right?

2 A. That is correct.

3 Q. So, for example, you showed Mr. Orton's back
4 tattoo. Do you remember that?

5 A. Mm-hmm. Yes.

6 Q. Do you understand that Miss Alexander did not ink
7 the entirety of that back tattoo?

8 A. That is my understanding, yes.

9 Q. In fact, the majority of it was inked by a
10 different tattoo artist; correct?

11 A. Sure. Like I said, I have not analyzed that tattoo
12 specifically.

13 Q. Right. What she inked was the extension at the
14 top; right?

15 A. I believe so.

16 Q. Now, unlike the examples of Harry Potter that you
17 talked about yesterday, you don't have an opinion that Mr.
18 Orton's tattoos drive more sales than the tattoos of anyone
19 else in WWE 2K; right?

20 A. I have not examined anybody else's tattoos in the
21 WWE games.

22 Q. Now, you also talked about fan reviews. Do you
23 remember that?

24 A. Yes.

25 Q. Now, fans complain about a lot of things; right?

1 A. Yes.

2 Q. And you have talked about one set of things that
3 they complain about, but you didn't talk about sort of the
4 world of fan review; right?

5 A. Do you mean the world more broadly, covering all
6 video games?

7 Q. No, in this game.

8 A. So, as part of my analysis, I did look at other --
9 I -- when fans are complaining, they are often complaining
10 about multiple things at the same time. Sometimes, they
11 were complaining about graphic elements. Sometimes, they
12 were complaining about things that were not --

13 Q. And not all fans complain about video games online;
14 right?

15 A. I believe so, yeah. That's fair.

16 Q. Not everyone puts their complaints into words.

17 A. No.

18 Q. And not everyone has complaints about a game,
19 either; right?

20 A. Of course.

21 Q. So, there's a certain subset of people that you
22 were focusing on with the game reviews that you were
23 reviewing; right?

24 A. Yes.

25 Q. Now, in forming your opinions, you didn't talk to

1 anyone else; right?

2 A. In forming my opinions, no.

3 Q. Okay. You didn't talk to Miss Alexander; right?

4 A. No, I did not.

5 Q. You didn't talk to Mr. Orton?

6 A. No, I did not.

7 Q. You didn't conduct interviews of customers, did
8 you?

9 A. That is correct.

10 Q. You didn't study purchasers of WWE 2K at all, did
11 you?

12 A. Specifically, no.

13 Q. Now, if you wanted to find out why people bought
14 WWE 2K, you could have conducted a survey; right?

15 A. I could have done a variety of things, including a
16 survey, yes.

17 Q. Okay. Are you aware that Take-Two's survey expert,
18 Dr. Deborah Jay, who will testify later this week, did
19 conduct such a survey?

20 A. I'm not familiar with what your expert has done.

21 Q. Okay. So, in reaching your conclusions, you did
22 not rely on the fact that she found that no purchasers
23 bought the game for the tattoos?

24 A. I believe I didn't. But for my research, I did use
25 a lot of documents. I don't recall right now off the top

1 of my head if that -- if that survey was one of the
2 documents that I, I looked at.

3 Q. Okay. So, turning back to your opinions --

4 A. Mm-hmm.

5 Q. -- you aren't here to tell the jury a dollar amount
6 of Take-Two's profits that you think are attributable to
7 Mr. Orton's tattoos; right?

8 A. That is correct.

9 Q. Similarly, you didn't provide a number of how much
10 the sales of WWE 2K would be affected if Mr. Orton's
11 tattoos were not included; right?

12 A. That is correct.

13 Q. And you didn't conduct a study of whether a version
14 of WWE 2K without Mr. Orton's tattoos would lose sales at
15 all; right?

16 A. I did not do a comparative study of that sort,
17 correct.

18 Q. Now, what you did do is you focused on Mr. Orton's
19 popularity; right?

20 A. Amongst other things, yes.

21 Q. And you view him as a popular person; right?

22 A. As a person? I don't know personally -- I don't
23 know him personally, so I have no -- no view on his
24 personality.

25 Q. Okay. Well, you refer to him as a Superstar in

1 WWE; right?

2 A. Yes.

3 Q. And you sort of touted the fact that he is a
4 Superstar; right?

5 A. So, if by -- if from your earlier question if you
6 meant a celebrity, yes, I looked at that.

7 Q. Well, my question is a little different. Are you
8 aware that all WWE wrestlers are called Superstars?

9 A. No.

10 Q. Now, you didn't talk to any fans about why they
11 like Mr. Orton, did you?

12 A. No, I did not talk directly to any fans.

13 Q. In fact, Mr. Orton is popular because he's a good
14 wrestler; right?

15 A. I would imagine so, that that would be a part of
16 his popularity.

17 Q. He's popular because he's a good entertainer;
18 right?

19 A. I would imagine that's a part of his popularity,
20 yes.

21 Q. He's popular because he's got special finishing
22 moves in WWE; right?

23 A. I imagine that would be a factor, yes.

24 Q. Are you familiar with the RKO?

25 A. Yes.

1 Q. Mr. Orton is charismatic; right?

2 A. I don't have an opinion on that.

3 Q. Okay. Do you think he's handsome?

4 A. Yeah, I think it's fair to say he's a handsome
5 wrestler.

6 Q. So, would you agree that Mr. Orton would be popular
7 with or without his tattoos?

8 A. I think it's hard to disentangle those, to be
9 honest.

10 Q. Because he wears them in real life?

11 A. Because they're a big part of his wrestling
12 persona.

13 Q. And let's say that Mr. Orton changed his tattoos
14 and removed the ones that Miss Alexander inked. Would it
15 no longer be your opinion that profits from WWE 2K are
16 attributable to those tattoos?

17 A. Let me see if I understand your question. If he
18 had completely different tattoos, would I make the same
19 argument here?

20 Q. Mm-hmm. Yes.

21 A. So, I think -- it's the tattoos that are important,
22 in terms of what he looks like, in making sure that his
23 character in the game looks like he likes -- looks the way
24 he does in a real-life event.

25 Q. But if he changed the skull tattoos to Harry

1 Potter, you would say that he needs to have Harry Potter in
2 the game to be realistic; right?

3 A. Yes.

4 Q. It wouldn't -- and it would not be realistic to
5 then use Miss Alexander's tattoos?

6 A. So, if he had a Harry Potter tattoo, I would expect
7 him to -- fans would expect him to show up in the game with
8 a Harry Potter tattoo.

9 Q. So, there's nothing about what Miss Alexander inked
10 on his body artistically that leads to your conclusions
11 about profits in the game; right?

12 A. So, my conclusion is not based on the particular
13 designs of the tattoos and on the artistic value that the
14 tattoos may have.

15 Q. Your opinions are based on the fact that Mr. Orton
16 elected to have ink permanently placed on his body; right?

17 A. No, they're based on his appearance in the real
18 world and the need for his appearance in the game, for his
19 game character, to look the way he does in the real world.

20 Q. But you understand that Mr. Orton decided how he
21 was going to look in the real world; right?

22 A. I would hope so.

23 Q. Okay. And regardless, you didn't conduct a study
24 to determine whether Mr. Orton's popularity contributed to
25 the success of WWE 2K; right?

1 A. A study focused on that specific question, no.

2 Q. And you didn't commission a study of what sales of
3 WWE 2K would be without Mr. Orton in it; right?

4 A. I did not do a comparative study, no, I did not.

5 Q. Now, you admit that there are a lot of reasons that
6 people buy WWE 2K; right?

7 A. Yes, I think it's fair to say that.

8 Q. Some people purchase WWE 2K because they like
9 wrestling games; isn't that true?

10 A. Yes, fans of wrestling are more likely to buy the
11 games, I believe that is true.

12 Q. And some people purchase WWE 2K because they like
13 the WWE; right?

14 A. Isn't that the same question or --

15 Q. well, you might have someone who likes wrestling in
16 general, and someone who likes WWE wrestling in particular;
17 right?

18 A. Oh, yes. Absolutely.

19 Q. Okay. And there are other things in the game, like
20 music; right?

21 A. That is true.

22 Q. Someone might like the music in the game.

23 A. Yes. I mean, we would hope though, because
24 otherwise they'd have to mute it all the time.

25 Q. Right. Some people might want to go to the club

1 when they are playing the video game; right?

2 A. I don't think so, because if they're playing the
3 video game, they want to play the video game.

4 Q. I'm sorry. I meant the club -- the club music that
5 we were talking about earlier, but regardless.

6 In fact, fans of the WWE are more likely to
7 purchase WWE video games; right?

8 A. In general, yes, I believe that would be the case.

9 Q. But you didn't determine how many people purchase
10 WWE 2K primarily because they like the WWE; right?

11 A. No, I did not study that.

12 Q. Some people purchase WWE 2K because they like the
13 fact that it has so many wrestlers; isn't that true?

14 A. I think that's plausible. I don't have any data to
15 support that, though.

16 Q. But there's over 100 wrestlers in WWE 2K; right?

17 A. Yes.

18 Q. In fact, according to you, making the other
19 wrestlers -- not Randy Orton -- look the way they look in
20 real life also drives consumer demand; right?

21 A. Wait. I'm sorry. I don't understand your
22 question.

23 Q. So, you said that making Randy Orton look the way
24 that he does in real life is -- drives demand for the
25 games; right?

1 A. Yes.

2 Q. But isn't it also true that making the other
3 wrestlers look how they look in real life also drives
4 demand for the games?

5 A. Yes. It's the same argument for all the wrestlers.

6 Q. But you haven't compared different wrestlers to see
7 who drives more sales of these games; right?

8 A. I have not looked at any sales.

9 Q. So, the jury can't tell from your opinions what the
10 value of Mr. Orton is versus any other wrestlers; right?

11 A. An exact number, no. I have not given any opinion
12 on an exact number. My opinion is that he's important.
13 He's not an insignificant wrestler in the context of the
14 games.

15 Q. Sure. But they can't know how much the sales of a
16 version of WWE 2K, without Mr. Orton in it, would be
17 negatively impacted, can they?

18 A. Well, that would be for them to decide.

19 Q. Okay. Well, WWE 2K has a lot of elements other
20 than Mr. Orton's tattoos that drive sales, doesn't it?

21 A. I think there are a lot of things that drive sales,
22 yes.

23 Q. And, for example, WWE 2K -- just like a real match
24 -- has action taking place in a wrestling ring in an arena;
25 right?

1 A. Are you saying it's -- in the game, you can play in
2 an arena? Yes.

3 Q. And the fact that the arenas in the game look the
4 way they do when you are watching on television also drives
5 demand for the game; right?

6 A. That would go to realism. Yes.

7 Q. Okay. Dr. Zagal, I'd like to ask you a few
8 questions about your education and work background, if we
9 can?

10 A. Sure.

11 Q. So, you don't have any degrees in cultural studies;
12 right?

13 A. I do not.

14 Q. No degrees in media studies?

15 A. No.

16 Q. No marketing degree?

17 A. I have studied marketing as part of my
18 undergraduate degree, but I do not have a degree in
19 marketing.

20 Q. Okay. You don't have a business degree?

21 A. Hmm. That's -- I don't have a -- so, my
22 undergraduate degree is in engineering -- in civil
23 industrial engineering. Civil industrial engineering is
24 not the same as a business degree the way it is in the
25 United States. But usually, half of the course work is

1 business-related, marketing, finance, accounting,
2 management, and a couple others of that sort.

3 Q. You don't have a specific degree that's a business
4 degree; right?

5 A. Not in the way that the business degree exists in
6 the United States.

7 Q. And you are not an economist, are you?

8 A. No.

9 Q. Now, on direct you said that you have not published
10 -- that you had not published any materials on the realism
11 in video games, any publications about realism in video
12 games; is that right?

13 A. Specific to realism, that is correct.

14 Q. And you haven't written any books about realism in
15 video games; right?

16 A. Specific -- so, yes, to an extent. I have
17 written --

18 Q. Let me ask you -- I'm sorry.

19 A. Yeah, it's not in my CV because my CV is outdated,
20 at this point. So, I have written a book and submitted the
21 manuscript to a publisher, it's under contract, where I am
22 looking at a specific game console that existed -- that was
23 commercially available about 20 years ago now. And as part
24 of that book, we do talk about realism. I have a co-author
25 on the book, as well.

1 Q. That book hasn't been published right?

2 A. It has not been published, no.

3 Q. Have you received feedback on the book?

4 A. Yes, but I'm still waiting for the final round of
5 feedback.

6 Q. So, you don't know whether the feedback will be
7 extensive on that book yet; right?

8 A. I have no idea what the feedback will look like.

9 Q. And you haven't written any books about why
10 consumers buy certain video games; right?

11 A. Specifically to purchases, no.

12 Q. You also haven't written about realism in video
13 games in the context of purchasing decisions; right?

14 A. That is correct.

15 Q. You have never published any scholarly articles
16 about sports video games; right?

17 A. Specific to sports video games, no.

18 Q. Not about wrestling games, certainly?

19 A. Also not specifically to wrestling games, no.

20 Q. And you wouldn't say you are an expert in tattoos,
21 would you?

22 A. No.

23 Q. You are not an intellectual property licensing
24 expert, are you?

25 A. That is correct, I am not.

1 Q. You are not a licensing expert at all; right?

2 A. That is correct.

3 Q. You have never negotiated a license for a video
4 game; correct?

5 A. I'm going to say no, but there's a sort of a gray
6 area. But for the purposes of the kinds of deals we were
7 talking about, like a big game like this, no.

8 Q. You haven't licensed content to include in a video
9 game that you were designing; right?

10 A. Technically, yes. But for the purposes of this
11 trial, this kind of a deal, a big franchise, no, I have not
12 done that.

13 Q. Let me just be clear. The kinds of deals you were
14 talking about on direct, you have never actually negotiated
15 those before; right?

16 A. Correct.

17 Q. You have never published any scholarly articles
18 about intellectual property licensing in video games;
19 right?

20 A. That is correct.

21 Q. Now, you don't own a video game company, do you?

22 A. Not anymore.

23 Q. Okay. And you have never sold a game that you
24 designed to consumers; right?

25 A. So, I used to work at an internet company where I

1 was responsible for the design of many games. These games
2 were available to consumers to play for free. But I have
3 not owned -- I have not owned or participated in a game
4 company that has sold games to consumers at the retail
5 level.

6 Q. Okay. Now, are you familiar with Take-Two's video
7 game expert Dr. Ian Bogost, who is going to testify later
8 this week?

9 A. Yes.

10 Q. Now, you actually went to school when he was a
11 professor; right?

12 A. Yes. I was getting my Ph.D. when he joined Georgia
13 Tech as a professor.

14 Q. And would you agree that Dr. Bogost is
15 well-regarded in the field of video games?

16 A. He's an excellent scholar.

17 Q. He is also a member of the Digital Games Research
18 Association that you mentioned on direct; right?

19 A. He has participated -- I don't know if he's a -- if
20 his membership is active right now. But, yes, he's a
21 member -- he's a very well-respected member of the game
22 scholarly community, correct.

23 Q. Do you know if he is an inaugural member?

24 A. Not off the top of my head.

25 Q. Okay. But you'd agree, he is a prolific author?

1 A. Oh, absolutely, yes.

2 Q. In fact, you have cited his work, haven't you?

3 A. Yes. I use it in my classroom, as well.

4 Q. In fact, you cited it in one of your books; right?

5 A. Probably, yes.

6 Q. And Dr. Bogost is well-known in the areas beyond
7 his academic work; right?

8 A. I believe so, yeah.

9 Q. In fact, he's made video games that have received a
10 lot of critical and media attention; right?

11 A. Yes.

12 Q. Now, Dr. Bogost also analyzed WWE 2K; right?

13 A. I believe so.

14 Q. And you actually agree with some of his
15 conclusions, don't you?

16 A. Some of them, yes.

17 Q. You agree that the game is realistic; right?

18 A. Yep.

19 Q. And you agree that the games are large; right?

20 A. Large in the sense of options for -- of things for
21 players to do and options to play, absolutely.

22 MR. SIMMONS: Mr. Thomas, would you please bring
23 up, for Dr. Zagal, Defendant's Exhibit 28. And what I'd
24 like to do is play it without sound for about five seconds,
25 if that's okay.

1 THE COURT: And it's not in evidence, counsel.

2 MR. SIMMONS: Correct. I just wanted to play it
3 for Dr. Zagal for identification purposes, Your Honor, so
4 that we can then move it into evidence.

5 THE COURT: Oh, okay. It wasn't clear -- you said
6 you wanted to play it. It wasn't clear whether you were
7 talking about publication. You just want it played for the
8 witness?

9 MR. SIMMONS: Yes, Your Honor.

10 THE COURT: All right.

11 (Video playing.)

12 Q. (BY MR. SIMMONS) Now, Dr. Zagal, this is a video
13 of WWE 2K18; right?

14 A. That's what it looks like, yes.

15 Q. And it's an accurate depiction of the game?

16 A. As far as I can tell, yes.

17 MR. SIMMONS: Your Honor, I'd move the admission of
18 Defendant's Exhibit 28 into evidence.

19 THE COURT: Mr. Friedman, any objections?

20 MR. FRIEDMAN: No objection.

21 THE COURT: Defendant's Exhibit 28 is admitted.

22 MR. SIMMONS: Your Honor, may I publish it to the
23 jury?

24 THE COURT: You may.

25 COURTROOM DEPUTY: Would you like the volume on?

1 MR. SIMMONS: No. There's only one exhibit I think
2 I'll need sound for, I hope.

3 COURTROOM DEPUTY: Okay.

4 MR. SIMMONS: All right. Can we bring that up for
5 the jury, please? There we go.

6 Mr. Thomas, would you play the first five seconds
7 of the clip for the jury?

8 (Video playing.)

9 Q. (BY MR. SIMMONS) Now, Dr. Zagal, you admit that
10 there are different modes of gameplay in WWE 2K; right?

11 A. Yes.

12 Q. And on direct, you showed us one mode which is the
13 custom player menu; right?

14 A. I showed two things.

15 Q. Okay. You showed us the custom player menu and you
16 showed us one way of playing the game in the ring; right?

17 A. That is correct.

18 Q. And there are a lot of wrestlers in this game,
19 aren't there?

20 A. Yep.

21 MR. SIMMONS: Okay. If we can take that down from
22 the jury. And, Mr. Thomas, what I'd like to do is play
23 just for Dr. Zagal, for identification, Defendant's Exhibit
24 16 with no sound.

25 (Video playing.)

1 Q. (BY MR. SIMMONS) Dr. Zagal, this is a video of WWE
2 2K17; right?

3 A. That's what it looks like.

4 Q. And it's an accurate depiction of the game; right?

5 A. As far as I can tell, yes.

6 MR. SIMMONS: Your Honor, I'd move the admission of
7 Defendant's Exhibit 16 into evidence.

8 THE COURT: Any objections?

9 MR. FRIEDMAN: No objection.

10 THE COURT: Defendant's Exhibit 16 is admitted.

11 MR. SIMMONS: Your Honor, may I publish it to the
12 jury?

13 THE COURT: You may.

14 MR. SIMMONS: Mr. Thomas, would you advance
15 Defendant's Exhibit 16 to 55 seconds in, and play it with
16 no sound -- continue to play it with no sound.

17 (Video playing.)

18 Q. (BY MR. SIMMONS) Now, Dr. Zagal, as you can see in
19 this clip, WWE 2K has a stadium with a crowd; right?

20 A. Yes.

21 Q. And the wrestlers wear realistic costumes in WWE
22 2K?

23 A. Yes, generally. Yes.

24 Q. The lighting is what you'd expect of a WWE
25 wrestling match?

1 A. Generally, yes.

2 Q. It looks the way you'd see something on television;
3 right?

4 A. Within the constraints of the technology, yes.

5 Q. Now, WWE 2K also has sounds that replicate the real
6 world; right?

7 A. Yes.

8 MR. SIMMONS: What I'd like to do is, just for
9 maybe for ten seconds, can we play the game with sound?
10 And, Mr. Thomas, if you could take us to 2 minutes and 35
11 seconds to do that.

12 (Video playing.)

13 Q. (BY MR. SIMMONS) Dr. Zagal, the sounds in WWE 2K
14 include crowds responding to a match; right?

15 A. Yes.

16 Q. And buzzers?

17 A. Yes.

18 Q. And announcers providing a play by play of the
19 match?

20 A. Yes.

21 Q. It includes music?

22 A. Yes.

23 Q. And the physics of the gameplay contributes to the
24 game's realism, too; right?

25 A. Yes, I agree.

1 Q. So, what I'd like to do is look at Plaintiff's
2 Exhibit -- switch gears and talk a little bit about Mr.
3 Orton, and I'd like to bring up Plaintiff's Exhibit 25,
4 which you were shown on direct, if that's okay.

5 MR. SIMMONS: Mr. Thomas, can you bring up
6 Plaintiff's Exhibit 25? And could we show that to the
7 jury, please.

8 Q. (BY MR. SIMMONS) So, this is the article that you
9 were talking about on direct; right?

10 A. Correct.

11 Q. It's a piece of marketing?

12 A. I guess you'd have to ask the WWE how they consider
13 it. But I think it's fair to say that they're using it to
14 promote and to talk to their fans, absolutely.

15 Q. You didn't investigate why this article was
16 created; right?

17 A. That is correct.

18 Q. You didn't investigate how it was created?

19 A. That is correct.

20 Q. Okay.

21 MR. SIMMONS: Let's go to page 17.

22 Q. (BY MR. SIMMONS) Okay. So, this is the page you
23 showed the jury earlier; right?

24 A. Yes.

25 Q. Now, at the top of this page it says:

1 "5. Randy Orton."

2 You see that?

3 A. Yes.

4 Q. And it says:

5 "Tattoo: Tribal design.

6 "Location: Back and shoulders."

7 Correct?

8 A. Correct.

9 Q. Now, you already testified that Miss Alexander did
10 not ink the entirety of that back tattoo; correct?

11 A. Of the back one? Correct.

12 Q. Okay. And if we go down to the second paragraph,
13 it indicates that Orton -- Mr. Orton had the back piece of
14 the tattoo since his days training in Ohio Valley
15 wrestling; correct?

16 A. Correct.

17 Q. So, the tattoo that this article is talking about
18 has existed since before Miss Alexander inked Mr. Orton;
19 right?

20 A. So, the tattoo in the picture is not the tattoo
21 that he had when he was training at Ohio Valley wrestling.

22 Q. Right. But you understand that when he was at Ohio
23 valley wrestling, he had a back tattoo that is the subject
24 of this article; right?

25 A. No, because the subject of the article is the

1 tattoo he actually has in the picture.

2 Q. Okay. So, you are saying that -- well, let me try
3 it this way: You would agree that the tattoo existed
4 without Miss Alexander's back extension when he was playing
5 for Ohio State; right?

6 A. Yes. That would be my understanding.

7 Q. Okay. Now, I want to go to a different page of
8 this document. Page eight, if we can. Now, this is a
9 piece about Mr. Goldberg; right?

10 A. Yes, I believe so.

11 Q. And he's another WWE Superstar; right?

12 A. Mm-hmm. I would imagine.

13 Q. And this is touting his tribal design; correct?

14 A. Correct.

15 Q. And if we go down in the article to the -- I think
16 it's the first paragraph -- or, I'm sorry, the second
17 paragraph -- no, that's right. That's right. I'm sorry.
18 My fault.

19 It talks about tribal tattoos; right?

20 A. Generally, yes.

21 Q. And it says: "Tribal tattoos in the U.S. may have
22 developed a bit of reputation for being unoriginal and
23 cliché." Right?

24 A. That's how the sentence begins, yes.

25 Q. Right. And then it goes on and says that Mr.

1 Goldberg had his own unique tattoo; right?

2 A. I don't think it says unique. It says his tribal
3 ink was the perfect representation of his brute strength
4 and ferocious attitude.

5 Q. Do you understand that Mr. Goldberg had this tattoo
6 before Mr. Orton's tattoos were inked?

7 A. I'm not sure about the timeline here.

8 MR. SIMMONS: Well, Mr. Thomas, would you show us
9 side by side, Mr. Goldberg's tattoo from this page on the
10 left and Mr. Orton's tattoo on the right?

11 Q. (BY MR. SIMMONS) Now, Dr. Zagal, would you agree
12 with me that the tattoos, the tribal tattoos, are similar?

13 MR. FRIEDMAN: Your Honor, object to the relevance
14 of this line of questioning.

15 THE COURT: Counsel?

16 MR. SIMMONS: Your Honor, the plaintiff is speaking
17 to the value of her tattoos. And so, comparing them to
18 other tattoos that are very similar shows the lack of
19 value.

20 THE COURT: Headset, please. Sidebar.

21 (Proceedings continued at the bench.)

22 THE COURT: Counsel, I'm not aware that any part of
23 plaintiff's claim in terms of her -- the value and her
24 actual damages is the measure that you are talking about,
25 so I'm not clear what the relevance is here. And I'm not

1 sure you've satisfied my curiosity.

2 MR. SIMMONS: Your Honor, their claim for damages,
3 on actual damages, the value of the work which turns on --
4 the value of the work as a tattoo as a work of art. And
5 so, from our perspective, other tattoos that look similar
6 show that it doesn't have a particular artistic value.

7 THE COURT: Are you going to have somebody testify
8 to that?

9 MR. SIMMONS: We will have people talking about
10 tattoos --

11 THE COURT: No. No. That's not my question.

12 MR. SIMMONS: Okay.

13 THE COURT: Specifically what you just represented,
14 are you going to have an expert or someone who testifies
15 that there is a diminished value in Miss Alexander's
16 tattoos based on the similarity with other tattoos?

17 MR. SIMMONS: Yes, Your Honor.

18 THE COURT: Mr. Friedman?

19 MR. FRIEDMAN: Your Honor, our objection is to
20 relevance. Dr. Zagal's testimony is that relates to the
21 tattoos in their incorporation of the video games, and the
22 realism and authenticity that they provide. It does not
23 have to do with the merits of the tattoos as art.

24 THE COURT: well, you can make that argument, but
25 that doesn't -- it -- my understanding on the relevance

1 that the defendants are asserting is that part of your
2 claim for actual damages goes to the value of Miss
3 Alexander's tattoos within the context of the games, as I
4 understand it.

5 I don't know who this Mr. Goldberg -- is Mr.
6 Goldberg in the game?

7 MR. SIMMONS: Yes, ma'am.

8 THE COURT: Okay. So he -- so this testimony or
9 his questions goes to the similarity of other tattoos that
10 appear in the game. Correct, counsel?

11 MR. SIMMONS: Yes, ma'am.

12 THE COURT: Okay. The objection is overruled.

13 (Proceedings continued in open court, jury
14 present.)

15 Q. (BY MR. SIMMONS) Dr. Zagal -- could we bring back
16 up the images? Dr. Zagal, so the other tattoos in this
17 game look similar to the tattoos that Miss Alexander inked;
18 right?

19 A. I have not examined other tattoos in this game.

20 Q. So, you didn't look at any other tattoos in the
21 game at all?

22 A. I mean, I get to see some of them when I was going
23 through the menus and -- but I did not analyze any of the
24 other tattoos in the game.

25 Q. Didn't notice them while you were playing?

1 A. I did notice them.

2 Q. Okay.

3 A. But I wasn't examining them.

4 Q. But you couldn't tell whether they were similar to
5 Miss Alexander's tattoos?

6 A. I mean, for some wrestlers they look very
7 different.

8 Q. Okay. Now, let's turn back to WWE 2K. Mr. Orton
9 doesn't appear in every match that someone plays; right?

10 A. Yes. Like, you can play the game and not play with
11 Randy Orton as a character.

12 Q. Right. So, you showed some clips of gameplay on
13 your direct, but there is a whole wealth of other ways you
14 could play this game and never see Mr. Orton; right?

15 A. I think it's technically possible to play the game
16 and never play or see the character of Randy Orton.

17 Q. Okay.

18 A. The game also features sort of interstitials that
19 appear that feature wrestlers, and so you might see Randy
20 Orton in that context.

21 Q. But you haven't analyzed whether you actually do
22 that; right? That's speculation on your part?

23 A. So, I have not specifically analyzed the
24 interstitials in the games, no.

25 Q. Okay. And it almost goes without saying, but when

1 Mr. Orton doesn't appear in the game, his tattoos don't
2 appear in the game either; right?

3 A. I mean, you're asking me to speculate on whether or
4 not, if 2K chose not to put Mr. Orton, would they leave his
5 tattoos in the game? I don't know. I mean, that would be
6 their decision, not mine.

7 Q. I guess I'm asking a different question. My
8 question is: If you don't select Randy Orton to play, then
9 you are not going to see his tattoos with the players in
10 the ring; right?

11 A. So, I showed how you could add his tattoos to a
12 Custom Character. So, I could play a game with a Custom
13 Character with Randy Orton's tattoos and play against other
14 characters, not playing Randy Orton. So --

15 Q. Okay. Let me -- let me try this a different way.

16 MR. SIMMONS: Mr. Thomas, what I'd like to do is
17 bring up, for Dr. Zagal, Defendant's Exhibit 11 for
18 identification purposes and to play it without sound for
19 five seconds.

20 (Video playing.)

21 Q. (BY MR. SIMMONS) Now, Dr. Zagal, this is a video
22 of WWE 2K16; right?

23 A. Yes, that's what it looks like.

24 Q. And it's an accurate depiction of the game; right?

25 A. As far as I can tell, yes.

1 MR. SIMMONS: Your Honor, I'd move for admission of
2 Defendant's Exhibit 11 into evidence.

3 MR. FRIEDMAN: No objection.

4 THE COURT: Defendant's Exhibit 11 admitted.

5 MR. SIMMONS: May I publish it to the jury, Your
6 Honor?

7 THE COURT: You may.

8 MR. SIMMONS: All right. Let's go ahead and play
9 that at 40 seconds into the clip, if we can, for the jury,
10 without sound.

11 (Video playing.)

12 Q. (BY MR. SIMMONS) Now, Dr. Zagal, this is a match
13 between Seth Rollins and Stone Cold Steve Austin; right?

14 A. That's what it looks like, right.

15 Q. And Randy Orton doesn't appear anywhere in this
16 video; right?

17 A. I cannot see Randy Orton in this video.

18 Q. And because he doesn't appear in the video, his
19 tattoos don't appear right -- either; right?

20 A. I don't see his tattoos in the video either.

21 Q. Okay.

22 MR. SIMMONS: Let's take that down. And what I'd
23 like to do is play for Dr. Zagal, for identification,
24 Defendant's Exhibit 10 without sound for five seconds.

25 (Video playing.)

1 Q. (BY MR. SIMMONS) Dr. Zagal, this is also a video of
2 WWE 2K16; right?

3 A. That's what it looks like, yes.

4 Q. And it's an accurate depiction of the game?

5 A. As far as I can tell, yes.

6 MR. SIMMONS: Your Honor, I'd move the admission of
7 Defendant's Exhibit 10 into evidence.

8 MR. FRIEDMAN: No objection.

9 THE COURT: Defendant's Exhibit 10 is admitted.

10 MR. SIMMONS: Your Honor, may I publish it to the
11 jury.

12 THE COURT: You may.

13 MR. SIMMONS: All right. Mr. Thomas, would you
14 advance Defendant's Exhibit 10 to 4 minutes in, and play it
15 to the jury with no sound.

16 (Video playing.)

17 Q. (BY MR. SIMMONS) Now, even when Mr. Orton is on
18 the screen during a match in WWE 2K, you would agree that
19 he moves around the ring; right?

20 A. Yes.

21 Q. And he and other wrestlers move around each other;
22 right?

23 A. Yes.

24 Q. Mr. Orton and other wrestlers perform wrestling
25 moves on each other?

1 A. Yep.

2 Q. Like, they tackle each other; right?

3 A. Yes.

4 Q. And they grapple with each other?

5 A. Yes.

6 Q. Mr. Orton and other wrestlers might use props in
7 the ring against each other in WWE 2K; right?

8 A. Yes. In some modes, they do.

9 Q. For example, a wrestler could pick up a table and
10 hit someone with it?

11 A. Yep. In some modes, yes.

12 Q. The wrestlers in WWE 2K try to knock each other
13 down?

14 A. Generally. It depends on the mode. The goals
15 might be different. But, yes, generally.

16 Q. And they wrestle each other to the ground?

17 A. Yes.

18 Q. You would agree that, given all this activity,
19 other wrestlers could get in the way of seeing Mr. Orton;
20 right?

21 A. In the way of the player -- yes.

22 Q. Okay.

23 MR. SIMMONS: Let's take that down. And I'd like
24 to show just Dr. Zagal Defendant's Exhibit 153, which is
25 not a video.

1 Q. (BY MR. SIMMONS) Dr. Zagal, this is an image from
2 WWE 2K; right?

3 A. I don't know which version of the game though but,
4 yes, it looks like from one of the games.

5 Q. And it's an accurate depiction of one of the games;
6 right?

7 A. Um -- it's been cropped in, but I think it comes
8 from -- it's part of a screenshot, is what it looks like to
9 me.

10 Q. It comes from WWE 2K; right?

11 A. I would guess so, yes.

12 Q. Okay.

13 MR. SIMMONS: Your Honor, I'd move for admission of
14 Exhibit 153 into evidence.

15 MR. FRIEDMAN: No objection.

16 THE COURT: Defendant's Exhibit 153 is admitted.

17 MR. SIMMONS: May I publish it to the jury, please?

18 THE COURT: You may.

19 Q. (BY MR. SIMMONS) Now, during gameplay, Dr. Zagal,
20 a referee can get in the way of seeing Mr. Orton's tattoos
21 when the referee is standing between Mr. Orton and the
22 camera; right?

23 A. Yes, that is possible.

24 Q. So can the ropes?

25 A. Yes.

1 Q. So can words on the screen, like the word
2 "cancel" which we can see in this image; right?

3 A. Yes.

4 MR. SIMMONS: All right. Let's take that down.
5 And, Mr. Thomas, what I'd like to do is bring up, for Dr.
6 Zagal, Defendant's Exhibit 5. Just Dr. Zagal.

7 Q. (BY MR. SIMMONS) Dr. Zagal, this is another image
8 from WWE 2K; right?

9 A. I can't tell which game it's from, though. But,
10 yes, it looks like it's from one of the 2K Games.

11 MR. SIMMONS: All right. Your Honor, I'd move the
12 admission of Defendant's Exhibit 5 into evidence.

13 THE COURT: Any objection?

14 MR. FRIEDMAN: No objection.

15 THE COURT: Defendant's Exhibit 5 is admitted.

16 MR. SIMMONS: Your Honor, may I publish it to the
17 jury?

18 THE COURT: Yes.

19 Q. (BY MR. SIMMONS) Now, Dr. Zagal, you showed us one
20 set of attire for Randy Orton in the game, but there are
21 other kinds of attire; right?

22 A. Correct.

23 Q. And a wrestler's own clothing might block the
24 tattoos; right?

25 A. Yes, there are clothing items he can wear.

1 Q. And so, in this image from WWE 2K, Mr. Orton's
2 tattoos are blocked by the shirt that he is wearing; right?

3 A. Correct.

4 Q. And the armbands around his elbows?

5 A. Yes. They partially cover parts of his arms, yes.

6 Q. And his wrist guards?

7 A. Yes.

8 Q. Okay.

9 MR. SIMMONS: Let's take that down. And what I'd
10 like to do is bring up Defendant's Exhibit 24 for just Dr.
11 Zagal.

12 Q. (BY MR. SIMMONS) Dr. Zagal, this is another image
13 from WWE 2K; right?

14 A. I can't tell which game it's from, but it looks
15 like it's from one of the games.

16 MR. SIMMONS: Your Honor, I'd move the admission of
17 Defendant's Exhibit 24 into evidence.

18 MR. FRIEDMAN: No objection.

19 THE COURT: Defendant's Exhibit 24 is admitted.

20 MR. SIMMONS: May I publish it to the jury, Your
21 Honor?

22 THE COURT: Yes.

23 Q. (BY MR. SIMMONS) Now, Dr. Zagal, Mr. Orton
24 sometimes wears a vest in WWE 2K, like he does in the WWE
25 games; right? Or WWE wrestling?

1 A. So, you are asking me if he can sometimes wear a
2 vest in the game?

3 Q. Yes.

4 A. The answer is yes.

5 Q. And he sometimes wears one in real life; right?

6 A. I would assume so. I don't follow WWE wrestling,
7 so.

8 Q. Not something you watch?

9 A. Not generally, no.

10 Q. Okay. Well, you would agree that when he wears a
11 vest in the game, you can't see all of his tattoos; right?

12 A. Yes.

13 Q. And because the vest blocks his back tattoos;
14 right?

15 A. Yes.

16 Q. Now, you also can't see all sides of Mr. Orton's
17 body at the same time; right?

18 A. No.

19 Q. And if Mr. Orton is moving around the screen
20 quickly, he might be blurred or out of focus; right?

21 A. I -- I don't really agree with that.

22 Q. Okay. Well, you described the videos we were
23 showing in court earlier as ghosting. Do you remember
24 that?

25 A. Yeah, that was the video and not the actual

1 gameplay.

2 Q. I understand. But in the actual game when someone
3 is moving quickly, they are still being represented by
4 pixels moving across the screen; right?

5 A. Sure.

6 Q. So, it could get blurry; right?

7 A. It would depend on the quality of your television.
8 But I have not found any evidence of people calling the
9 game blurry. We see blurriness in the footage sometimes,
10 but that's because of the downgrade in the quality of the
11 image.

12 Q. Okay. But you would agree that when you are
13 observing wrestlers like Mr. Orton in WWE 2K, the tattoos
14 aren't always visible as you are watching the match; right?

15 A. Yes, I agree with that.

16 Q. And when Mr. Orton does appear on screen, he
17 appears smaller than he does in real life; right?

18 A. That would depend on the size of your television
19 and whether or not the image is zoomed in. But I think
20 it's fair to say that Mr. Orton can and often will appear
21 smaller than in real life.

22 Q. Are you aware that he is six-foot-five?

23 A. No. He's really tall.

24 Q. Yeah. And he appears on a small television; right?

25 A. I think nowadays people are not playing the games

1 on really small televisions, especially not this size. It
2 would depend on the device. But again, if your point is,
3 does Mr. Orton ever appear smaller on the screen than he is
4 in real life, the answer is yes.

5 MR. SIMMONS: All right. Mr. Thomas, you can take
6 that down.

7 Q. (BY MR. SIMMONS) Now, Dr. Zagal, on direct you
8 talked about this Create a Superstar or Custom Superstar
9 feature in WWE 2K16. Do you remember that?

10 A. Yes.

11 Q. Now, you only showed WWE 2K16; right?

12 A. Correct.

13 Q. Did you look to see whether Mr. Orton's appeared in
14 that feature in the subsequent versions of WWE 2K?

15 A. If Mr. Orton appears in that feature?

16 Q. No, if Mr. Orton's tattoos appear in the Create a
17 superstar feature of games after WWE 2K16?

18 A. If only tattoos, separate from Mr. Orton?

19 Q. Yes.

20 A. Do they appear in the other games?

21 Q. Correct.

22 A. No, not that I could find.

23 Q. And in that feature, you can only add Mr. Orton's
24 entire arms or entire back; right?

25 A. Yes.

1 Q. You can't pick the tattoos out individually; right?

2 A. Correct.

3 Q. So, you would have to include tattoos that Miss
4 Alexander did not ink, when you are making those
5 selections; right?

6 A. Yeah. So, the specific options which I showed were
7 each arm separately and the back.

8 Q. And you would agree that Mr. Orton's tattoos are
9 part of his likeness; right?

10 A. Likeness in -- how are you using the term?

11 Q. Well, you have used the term before; right?

12 A. I'm not sure I used the term likeness.

13 Q. Okay. Is it your view -- let me just ask it to you
14 this way: Do you think that Mr. Orton's tattoos are part
15 of his likeness?

16 MR. FRIEDMAN: Objection, calls for a legal
17 conclusion.

18 THE COURT: Sustained, unless you further define
19 that.

20 MR. SIMMONS: Okay.

21 Q. (BY MR. SIMMONS) In your video game research, you
22 are analyzing what people look like; right?

23 A. No, not specifically.

24 Q. Well, you did in this case; right?

25 A. Well, not in what people look like in general.

1 Q. Okay. But what Randy Orton looks like.

2 A. So, I'm analyzing whether his game character looks
3 like the wrestler. That, yes.

4 Q. Okay. And when you are talking about that, in the
5 course of this case, you are relying on your prior
6 research; right?

7 A. Yes.

8 Q. And in your prior research, have you ever used the
9 term likeness before?

10 A. I'm not sure. I'd have to go back to the report
11 and see if that word appears.

12 Q. Okay. But outside of this case, you can't remember
13 a single time that you talked about the word likeness;
14 right?

15 THE COURT: Counsel, can we have a sidebar, please?

16 (Proceedings continued at the bench.)

17 THE COURT: Mr. Simmons, as you know in the context
18 of this case, likeness is not a generic term. It has
19 certain legal significance. To the extent you are
20 questioning -- again, if you are attaching the legal
21 significance, that's inappropriate.

22 So, perhaps you can use another term. But when you
23 talk about, is it part of his likeness? Then you are
24 getting into the legal significance and legal conclusion in
25 terms of how it relates to the infringement question. So,

1 I think that's the issue.

2 You guys like to use certain terms that have legal
3 significance as if you are using it generically, and you
4 are not.

5 MR. SIMMONS: Understood, Your Honor. During his
6 deposition, he admitted in the deposition that Randy
7 orton's tattoos are part of his likeness. That's --

8 THE COURT: Then why don't you impeach him?

9 MR. SIMMONS: I can do that, Your Honor.

10 THE COURT: Okay. Thank you.

11 (Proceedings continued in open court, jury
12 present.)

13 MR. SIMMONS: Your Honor, request permission to
14 read Dr. Zagal's deposition transcript, page 104, lines 1
15 through 3?

16 THE COURT: No, you cannot read it. You know how
17 to -- if you are attempting to show inconsistent testimony,
18 you know how to do that.

19 MR. SIMMONS: Yes, ma'am.

20 Q. (BY MR. SIMMONS) All right. Dr. Zagal, you gave a
21 deposition in this case; right?

22 A. Yes.

23 Q. And you were under oath; right?

24 A. Now and during the deposition, yes.

25 Q. And you swore to tell the truth; right?

1 A. Yes.

2 Q. And you did tell the truth; right?

3 A. Mm-hmm.

4 Q. And after that deposition, you were given a copy of
5 your deposition transcript; correct?

6 A. Yes.

7 Q. And you were given the opportunity to make any
8 corrections you wanted to that transcript; right?

9 A. I don't think anything I wanted, but I -- yes, I
10 was allowed to review it and make corrections.

11 Q. And you made two pages of corrections; right?

12 A. I believe so.

13 Q. And then you signed that transcript; right?

14 A. I believe so, yes.

15 Q. And you, in fact, had that notarized; isn't that
16 right?

17 A. I did not have it notarized.

18 Q. Okay.

19 A. Like by me, personally.

20 Q. Okay. But someone notarized it for you; right?

21 A. I -- I don't know.

22 Q. Okay. You don't remember.

23 During the course of that deposition, I asked you
24 this --

25 THE COURT: Counsel? I'm going to ask you to

1 refrain from the extra statements. You just made one. You
2 probably didn't even know that you did it. Okay? But
3 could you stick to the questions?

4 MR. SIMMONS: Yes, ma'am.

5 THE COURT: All right.

6 MR. FRIEDMAN: Your Honor, I object as improper
7 impeachment. And again, for relevance --

8 THE COURT: We haven't gotten there yet, Mr.
9 Friedman. I'm thinking we're going to get to some citation
10 to the transcript where you are claiming --

11 MR. SIMMONS: Yes, Your Honor.

12 I direct counsel to page 104, lines 1 through 3.

13 THE COURT: Okay. Are you going to read the
14 question and the answer?

15 MR. SIMMONS: Yes, Your Honor.

16 Q. (BY MR. SIMMONS) I asked you this question and you
17 gave this answer:

18 "Randy Orton's tattoos are part of his likeness;
19 true?"

20 Answer: "Correct."

21 THE COURT: Are you going to ask him if --

22 Q. (BY MR. SIMMONS) Was that your testimony at the
23 time?

24 A. Can I check the transcript -- well, I assume the
25 transcript is correct so, yes, that was my testimony.

1 Q. Okay. Now, you -- I'd like to end by talking about
2 why the works in this case were -- in this case were
3 created. Now, your view is that video game companies
4 license material to make money; right?

5 A. Yes.

6 Q. But, Dr. Zagal, that's not the only reason that
7 companies create video games; right?

8 A. Like any kind of company? Correct. There are
9 companies that make video games not to make money.

10 Q. And that's because creating video games is
11 creative; right?

12 A. Yes.

13 Q. Video games are a form of artistic expression,
14 aren't they?

15 A. Yes.

16 Q. There are even video game makers who are considered
17 artists; right?

18 A. Correct.

19 Q. When a video game is created, the creator has to
20 make choices to make it better; right?

21 A. Choices to make it -- what was the last word?

22 Q. Better?

23 A. Yes.

24 Q. So, one choice could be to increase the quality of
25 the video game; right?

1 A. Correct.

2 Q. Another choice would be adding details to make it
3 more fun for people to play; right?

4 A. Correct.

5 Q. And not every choice made in creating a video game
6 is dictated by the goal of achieving profit; right?

7 A. For games that are not made for profit, yes. For
8 games that are made for profit, the ultimate goal is to
9 make profit. And so, everything leads up to that.

10 Q. So, is it your testimony that if I am selling a
11 game, and trying to sell it to people to make money, every
12 single decision I make in the course of that game is to
13 make profit?

14 A. So, video games are made by large companies with
15 lots of employees. Individual employees might have their
16 own personal reasons to do things but, ultimately, there
17 are levels of approval. And ultimately, the goal of the
18 company, the reason they're -- the reason for existence is
19 to make profit.

20 Q. So, some things might be in the game for reasons
21 other than profit; right?

22 A. I guess, yes, there are some things that could be
23 in the game not for -- well --

24 Q. Now -- oh, I'm sorry. I didn't mean to cut you
25 off.

1 A. So, for example, we could say that the initial
2 screen that had all those -- it was explaining all the
3 licenses that were in the game? You might say, well, the
4 initial reason for that is, they are in there for legal
5 reasons, to avoid lawsuits and things like that.

6 But I think, ultimately, it comes down to the
7 reason of existence for the company, which is to make a
8 profit. And paying money on licenses is not good for
9 business, generally.

10 Q. Okay. Well, let's talk about WWE 2K specifically.
11 You admit that it's a realistic depiction of WWE
12 wrestling; right?

13 THE COURT: Excuse me, counsel. I'm sorry.
14 Headsets, sidebar.

15 (Proceedings continued at the bench.)

16 THE COURT: I'm sorry, Mr. Simmons. I didn't mean
17 to cut you off. Are you going to a new area? And my
18 question is, how much longer you have, because I'm trying
19 -- I'm contemplating the need for a break at this point?

20 MR. SIMMONS: Your Honor, if you wanted to take a
21 break now, that would be fine. I can pick up --

22 THE COURT: That wasn't my question.

23 MR. SIMMONS: I have about five minutes left in my
24 exam.

25 THE COURT: Okay, then we'll finish.

1 MR. SIMMONS: Okay.

2 (Proceedings continued in open court, jury
3 present.)

4 Q. (BY MR. SIMMONS) So, turning back to WWE 2K, you
5 admit that WWE 2K is a realistic depiction of WWE
6 wrestling; right?

7 A. Well, that's its goal, yes.

8 Q. And you also admit that making the game more
9 realistic is an artistic choice; right?

10 A. I think that's fair, yes.

11 Q. The focus of WWE 2K is playing as a wrestler in a
12 wrestling ring; correct?

13 A. Broadly speaking, yes.

14 Q. But there are many things that are part of the
15 realism of WWE 2K; right?

16 A. Yes.

17 Q. And all of the professional wrestlers who appear in
18 WWE 2K are depicted how they appear in real life; true?

19 A. I did not analyze all the wrestlers and how they
20 are depicted. However, I did find examples of fans
21 complaining about some wrestlers appearing not well in the
22 game and not -- and comparing them to other wrestlers that
23 were in the game.

24 Q. Okay. But you would agree that the wrestlers in
25 the game, Take-Two is trying to make them look like they

1 look in real life; right?

2 A. Yes. As a general goal, yes.

3 Q. And Randy Orton is just one of all of those
4 wrestlers; right?

5 A. He's an important one but, yes, he is one of many.

6 Q. And when Take-Two decided to include Mr. Orton in
7 WWE 2K, it wanted him to look like he looks in real life;
8 correct?

9 A. Yes.

10 Q. So, the purpose of including Mr. Orton with his
11 tattoos was to make the game more realistic; right?

12 A. Yes. To make the game character more realistic,
13 yes.

14 Q. Okay. And as part of that process, Take-Two tried
15 to make his tattoos look how they look in real life; right?

16 A. Correct.

17 Q. And you -- your review is that Take-Two
18 accomplished that goal; right?

19 A. Yes.

20 Q. Do you also admit that there is a license between
21 WWE and Take-Two; right?

22 A. Yes. I imagine there is, based on the information
23 in the beginning of the games.

24 Q. And you are aware that WWE licensed Mr. Orton's
25 rights to Take-Two; right?

1 A. That is my understanding, yes.

2 Q. And Randy Orton's tattoos are part of his likeness;
3 true?

4 MR. FRIEDMAN: Objection, calls for legal
5 conclusion.

6 THE COURT: Sustained.

7 MR. SIMMONS: All right.

8 Q. (BY MR. SIMMONS) Well, Mr. Orton's tattoos were
9 created for a different purpose; right?

10 A. I am not Mr. Orton, so I can't -- or Miss
11 Alexander. I can't speak to the reasons of those tattoos.

12 Q. You don't know whether they reflect Mr. Orton's
13 personal expression; right?

14 A. I think it's fair to say that, in general, Mr.
15 Orton wanted those tattoos because he wanted them. He has
16 his own reasons for that.

17 Q. And no one is purchasing WWE 2K instead of getting
18 tattooed by Miss Alexander; is that right?

19 A. I'm sorry. Could you repeat the question?

20 Q. No one is purchasing WWE 2K instead of getting
21 tattooed by Miss Alexander; true?

22 A. I have not studied that, so I have no opinion on
23 that.

24 Q. Dr. Zagal --

25 MR. SIMMONS: I direct counsel to page 178, lines

1 20 to 22 of your deposition.

2 Q. (BY MR. SIMMONS) 178, lines 20 to 22. Did I ask
3 you this question and did you give this answer:

4 "No one is purchasing WWE 2K instead of getting
5 tattooed by Miss Alexander; right?"

6 Answer: "I do not think so."

7 A. I'm sorry. What was the question?

8 Q. Was that your answer to my question, when I deposed
9 you --

10 A. If you read that in my deposition then, yes.

11 Q. Now, I want to be crystal clear here. WWE 2K is
12 not a substitute for the tattoos Miss Alexander inked;
13 right?

14 A. Are they different things? Yes, they are different
15 things.

16 Q. They are not substitutes for each other; correct?

17 MR. FRIEDMAN: Objection, calls for a legal
18 conclusion.

19 MR. SIMMONS: Your Honor, I can read his deposition
20 again.

21 THE COURT: I'm not even sure what you mean by
22 substitution, so I don't even understand the question.

23 MR. SIMMONS: Fair enough.

24 Q. (BY MR. SIMMONS) Dr. Zagal, WWE 2K is not a
25 substitute for the tattoos at issue in this case; right?

1 MR. FRIEDMAN: Objection, calls for legal
2 conclusion.

3 THE COURT: Can we -- sidebar, please.

4 (Proceedings continued at the bench.)

5 THE COURT: Again, it is not clear to me what we're
6 referring to when we talk about substitution, so I don't
7 know whether it's calling for a legal conclusion or not.

8 Perhaps, Mr. Simmons, you can clarify for me what
9 it is you are asking.

10 MR. SIMMONS: Yeah. Your Honor, he -- this is
11 another situation where I am reading straight out of his
12 transcript and he's --

13 THE COURT: I know, but some context. What were
14 you referring -- substitution meaning what?

15 MR. SIMMONS: You wouldn't buy a WWE 2K game
16 instead of buying -- going to get inked, get a tattoo
17 inked.

18 THE COURT: Perhaps you can clarify the question.

19 MR. SIMMONS: Okay.

20 THE COURT: Thank you.

21 (Proceedings continued in open court, jury
22 present.)

23 Q. (BY MR. SIMMONS) Dr. Zagal, you wouldn't buy a WWE
24 2K game instead of getting inked with one of Miss
25 Alexander's tattoos; right?

1 A. Personally?

2 Q. A person would not do that; right?

3 A. Oh. A person? I don't know.

4 Q. Okay. You haven't studied the tattoos?

5 A. In what way do you mean?

6 Q. Do you think someone's buying a WWE 2K video game
7 and would be happy with that, instead of getting inked by
8 Miss Alexander?

9 A. Like, right now on the stand, I would say I could
10 imagine some people might want to make that choice or not.
11 But it's not something I believe I studied.

12 Q. So, someone goes into a tattoo parlor and says, "I
13 want a tattoo," and instead I hand them a video game and
14 they say, "Great. That's what I wanted."

15 THE COURT: At this point, counsel, I'm not sure --
16 what's the relevance here?

17 MR. SIMMONS: Your Honor, it goes to fair use, Your
18 Honor.

19 THE COURT: Whether or not someone would walk into
20 a tattoo parlor and say, "Oh, instead just give me a game
21 to play"?

22 MR. SIMMONS: Yes, Your Honor. It goes to the
23 question --

24 THE COURT: No. Move on, counsel. This is, this
25 is --

1 MR. SIMMONS: Sure.

2 THE COURT: -- this is --

3 MR. SIMMONS: Yes, Your Honor.

4 THE COURT: -- tenuous at best.

5 Q. (BY MR. SIMMONS) Dr. Zagal, you told me, when we
6 last met, that you were not aware of a video game company
7 ever licensing tattoos to be used on the people that bear
8 them in real life; right?

9 A. I believe so.

10 MR. SIMMONS: No more questions, Your Honor.

11 THE COURT: Okay. Ladies and gentlemen, this is a
12 good time for us to go ahead and take a morning break.
13 Please remember my instructions to you and my admonitions,
14 and we will be in recess until 11:00.

15 COURTROOM DEPUTY: All rise.

16 (Proceedings continued in open court, jury not
17 present.)

18 THE COURT: Okay. Please be seated.

19 Before we go out to recess, Mr. Simmons indicated
20 that there are other issues related to other witnesses.
21 Could you please enlighten me?

22 MR. SIMMONS: Yes, Your Honor. There are three
23 issues -- Your Honor, there are three issues that the
24 parties wanted to raise to the Court in the course of
25 today. The first one is with regard to Miss Alexander's

1 testimony. Plaintiff's counsel indicated to us last night
2 that they intend to use our opening slides as
3 demonstratives with Miss Alexander. We'd like to address
4 that with the Court.

5 THE COURT: Hold on. Hold on. They intend to use
6 slides with Miss Alexander that you used during opening
7 statements; correct?

8 MR. SIMMONS: Yes, Your Honor.

9 THE COURT: I assume that you used those slides in
10 opening statement in anticipation, of course, that at some
11 point they would be admitted into evidence.

12 MR. SIMMONS: Yes, Your Honor.

13 THE COURT: Is there a reason why then -- so, are
14 you suggesting that only -- that you intend to admit
15 something into evidence, but that the plaintiff cannot use
16 it in their testimony?

17 MR. SIMMONS: Your Honor, our understanding is that
18 plaintiff does not intend to admit the exhibits that are
19 inside those demonstratives before showing them to the jury
20 as part of presentation of evidence, and we wanted to
21 clarify your preferences as to that.

22 THE COURT: I have no idea what you are even asking
23 me.

24 MR. SIMMONS: Plaintiff is not planning to admit
25 the exhibits that are in those demonstratives before they

1 would be shown to the jury.

2 THE COURT: What -- hold on. Exhibits and
3 demonstratives?

4 MR. SIMMONS: Yes, ma'am.

5 THE COURT: Could somebody -- Mr. Simon, could you
6 help me understand what we're talking about here?

7 MR. SIMON: Yes, Your Honor.

8 They showed the jury demonstratives. We didn't
9 object to them. We have agreed to exchange demonstratives
10 the night before.

11 I have questions for Miss Alexander because, as you
12 know in their opening, they talked about, for example, a
13 bunch of video games where they claim Randy Orton was in
14 there. And I want to show her what they showed the jury
15 and say, *Have you ever heard of this before?*

16 They're arguing waiver, which means that -- a
17 deliberate relinquishment of a known right. I'm just going
18 to show her what they showed here. *Here's these video*
19 *games before, that were earlier. Have you ever heard of*
20 *them before? Have you ever seen them?* And I just want to
21 put it in context. They showed it.

22 THE COURT: I'm not understanding the objection.

23 MR. SIMMONS: Our concern, Your Honor, was that we
24 would be violating Your Honor's preferences. Some courts
25 we have been in, would not allow a demonstrative, to show

1 an exhibit, if it hasn't been admitted before. We just
2 wanted to confirm what your practices were.

3 THE COURT: Mr. Simmons, do you deny that you
4 intend to admit the exhibit at some point?

5 MR. SIMMONS: We do intend to admit it at some
6 point.

7 THE COURT: Okay, then your objection is overruled.
8 What's next?

9 MR. SIMMONS: The second issue has to do with RFA
10 responses. Plaintiff --

11 THE COURT: I'm sorry?

12 MR. SIMMONS: Request for Admission responses.
13 Plaintiff has indicated that they plan to read into the
14 record responses from the parties as to Request for
15 Admission.

16 THE COURT: Yes?

17 MR. SIMMONS: And our concern is, we are trying to
18 meet-and-confer on the issue, and we weren't clear whether
19 Your Honor's practices were to read the question and our
20 substantive response, because we didn't write the question,
21 Your Honor. So, that's an out-of-court statement, from our
22 perspective.

23 THE COURT: They can read discovery responses,
24 including your responses to Requests to Admit. In order to
25 understand the response, you have to understand the

1 question.

2 MR. SIMMONS: Okay.

3 THE COURT: They may read the question and the
4 response.

5 MR. SIMMONS: Understood, Your Honor.

6 The last issue has to do with Mr. Kiang.
7 Plaintiff's counsel has objections to certain
8 demonstratives.

9 And Mr. Krasik could address that with the Court.

10 MR. KRASIK: Yes, Your Honor. When we exchanged
11 the demonstratives for Mr. Kiang's deposition, plaintiffs
12 indicated they objected to slides 5 through 14 of the
13 demonstratives.

14 THE COURT: So -- let's back up. What are we
15 talking -- demonstrative means something that you use to
16 demonstrate but will not come into evidence.

17 MR. KRASIK: That's correct, Your Honor.

18 THE COURT: So, what are we talking about here?

19 MR. FRIEDMAN: Your Honor, if I could, this is our
20 objection -- I think I can cut through this. The plaintiff
21 has objected to showing certain demonstratives, to
22 publishing certain demonstratives. In particular --

23 THE COURT: To who publishing certain
24 demonstratives?

25 MR. FRIEDMAN: To the defense publishing certain

1 demonstratives during the anticipated testimony of the
2 corporate representative of WWE, Mr. Kiang, or a witness
3 for them.

4 THE COURT: In the defendants' case?

5 MR. FRIEDMAN: That's correct.

6 THE COURT: Oh. Talk to me about this --

7 MR. FRIEDMAN: We can talk about this later.

8 (Court recessed from 10:44 a.m. to 11:05 a.m.)

9 (Proceedings continued in open court, jury
10 present.)

11 THE COURT: Do you have any questions -- any
12 additional questions for this witness, Mr. Friedman?

13 MR. FRIEDMAN: Yes, Your Honor, I do.

14 THE COURT: You may proceed.

15 MR. FRIEDMAN: Thank you. And I'll be brief.

16 REDIRECT EXAMINATION

17 BY MR. FRIEDMAN:

18 Q. Dr. Zagal, I'd like to address just three points
19 that were brought up by Mr. Simmons. You'll recall that
20 Mr. Simmons had asked you questions about fan complaints,
21 whether it be on websites or social media, complaining
22 about appearance or other aspects of the 2K games?

23 A. Yes, I do.

24 Q. Do you remember that? And Mr. Simmons had asked
25 you whether there was a group of fans out there who choose

1 not to complain; right?

2 A. Yes, I believe he did.

3 Q. All right. Is there a subset of fans or
4 prospective buyers out there that consume reviews about
5 video games before they make purchasing decisions?

6 MR. SIMMONS: Objection, Your Honor, leading.

7 THE COURT: Overruled.

8 A. So, I can answer, right?

9 Q. (BY MR. FRIEDMAN) You may answer.

10 A. Okay. Yes, there are people who will consult
11 reviews before purchasing a game.

12 Q. And those folks might include people who never make
13 a decision to go and complain online; right?

14 A. That is possible, yes.

15 Q. And yet the criticism online may affect their
16 purchasing behavior?

17 A. Yes.

18 Q. Dr. Zagal, you were asked a few questions about the
19 Custom Superstar feature that you displayed to the jury in
20 the 2K16 game. Do you remember that?

21 A. Yes.

22 Q. All right. And I believe you were asked whether or
23 not the tattoos of Miss Alexander's appeared in the 2K17
24 and 18 versions of the game; right?

25 A. I believe I was asked specifically about the custom

1 creator.

2 Q. Okay. Does the custom creator exist in the 2K17
3 and 18 games, like it does in the 2K16 game that you showed
4 the jury?

5 A. Yes, it does.

6 Q. Do the custom creators include the ability to add
7 Miss Alexander's tattoos to custom wrestling characters in
8 the '17, and '18 versions of the game?

9 A. No, I believe they do not.

10 Q. Do they include other tattoos that you can add to a
11 superstar?

12 A. Yes.

13 Q. Okay. But between the 2016 game, moving on to the
14 '17 and '18 games, does it appear that the tattoos of Miss
15 Alexander's were removed from that particular feature in
16 the game?

17 A. In the specific feature of the custom creator, it
18 was my understanding that, yes, they have been removed.

19 Q. Thank you. And, Dr. Zagal, you were asked some
20 questions about -- or concerning this word or issue of --
21 likeness. I believe you were asked whether or not Mr.
22 Orton's tattoos are a part of his likeness. Do you
23 remember that?

24 A. Yes.

25 Q. All right. Now, what did you mean by likeness?

1 A. So, as a layperson, likeness is, *Could I recognize*
2 *this person from a certain element or a certain aspect?*
3 *Does this person look similar?* Oh, these two people look
4 like each other. They share certain features which you may
5 not be able to specifically call out, but they look similar
6 to each other. They bear a resemblance, for example.

7 Likeness, in the case of my analysis, is, *Does the*
8 *character Randy Orton look like the character -- the person*
9 *of Randy Orton the wrestler?*

10 Q. When you were answering those questions and during
11 that portion of your testimony, were you referring to the
12 legal definition of the word likeness?

13 A. No.

14 Q. Do you know what the legal definition of likeness
15 is?

16 THE COURT: Counsel, that's not relevant.

17 MR. FRIEDMAN: Thank you, Your Honor. That's all
18 the questions I have.

19 THE COURT: All right. Thank you.

20 Any further examination of this witness, Mr.
21 Simmons?

22 MR. SIMMONS: No, Your Honor.

23 THE COURT: All right. Thank you, Doctor. You may
24 step down.

25 Mr. Simon, you may call your next witness?

1 MR. SIMON: Yes, Your Honor.

2 At this time we will call through video deposition
3 the Defendants' Take-Two Interactive Software, Inc., 2K
4 Games, Inc., 2K Sports, Inc., and Visual Concepts
5 Entertainment, through the representative of Mark Little.

6 And we have designated that as Plaintiff's 156, for
7 the record.

8 THE COURT: All right. So, ladies and gentlemen,
9 you are about to hear testimony through the presentation of
10 a videotaped deposition. You should consider that
11 testimony as if that testimony were being given right here
12 in court, consider it for the same purposes and in the same
13 way.

14 The transcript -- what's the number on it?

15 MR. FRIEDMAN: 156.

16 THE COURT: -- 156 will be as part of the record
17 but it is not admitted as substantive evidence.

18 (Whereupon, the videotaped deposition of Mark
19 Little, dated August 14, 2019, Plaintiff's Exhibit 156, was
20 played to the jury at this time.)

21 MR. SIMON: Thank you, Your Honor. That concludes
22 the deposition testimony from both sides.

23 And at this time, I'd move the admission of
24 Plaintiff's Exhibits 29, 30, 31, 32, 33, 35.

25 MS. CENDALI: No objection, Your Honor.

1 THE COURT: Okay. Give me those again?

2 MR. SIMON: Yes. 29, 30, 31, 32, 33, and 35.

3 THE COURT: Plaintiff's Exhibits 29, 30, 31, 32,
4 33, and 35 are admitted without objection.

5 All right. Then we will go ahead and -- what's
6 your next -- do you plan on calling another live witness --

7 MR. SIMON: We have a deposition, Your Honor.
8 Another one. So, we thought a break here would be ideal.

9 THE COURT: All right. So, ladies and gentlemen,
10 we're going to go ahead and break for lunch. We will take
11 45 minutes for lunch and so -- 12:35?

12 Is that right, Stacie?

13 COURTROOM DEPUTY: Yes.

14 THE COURT: Okay. So, we will be on recess. We
15 will reconvene at 12:35.

16 COURTROOM DEPUTY: All rise.

17 (Proceedings continued in open court, jury not
18 present.)

19 THE COURT: Okay, counsel, please be seated.

20 I'm going to take one more quick stab to see if I
21 can figure out this other issue, even though it doesn't
22 come until defendants' case. But I'm just having a hard
23 time understanding, what is the issue.

24 Can someone please articulate the issue?

25 MR. KRASIK: Your Honor --

1 THE COURT: Mr. Krasik, hold on.

2 MR. FRIEDMAN: Thank you, Your Honor.

3 Your Honor, this has to do with the fact witness,
4 Mr. Edward Kiang. We object to Page Nos. 5 -- I have a
5 copy for the Court, if the Court would like to see it.

6 We object to Page Nos. 5 through 14. They don't
7 contain any exhibit numbers --

8 THE COURT: Hold on. Hold on. Hold one. I don't
9 know what you are talking about.

10 MR. FRIEDMAN: Permission to approach?

11 THE COURT: Yes. Could you just hand that to Miss
12 Hurst?

13 MR. FRIEDMAN: Yes.

14 THE COURT: Okay. So, what are we talking about
15 here? You are calling Mr. Kiang by video.

16 MR. FRIEDMAN: That's correct, Your Honor.

17 This is a copy of the demonstratives that the
18 defendants have provided to the plaintiff that they intend
19 to use with Mr. Kiang, when they call him live in their
20 case.

21 THE COURT: All right. Now, by demonstratives, Mr.
22 Krasik, during the course of your case you will be calling
23 Mr. Kiang to the trial -- I mean, to the stand. And you
24 intend -- are these stills? Or you intend to use video
25 demonstratives with him during the course of his testimony?

1 MR. KRASIK: The pages that are at issue of the
2 slides are still photos, Your Honor. There are certain
3 videos we intend to use, but not these.

4 THE COURT: Okay. So you -- so, what you handed to
5 me, this, this packet of information says "Ed Kiang
6 direct." What is this? These are demonstratives that you
7 intend to use during his direct examination?

8 MR. KRASIK: Correct.

9 THE COURT: And, Mr. Friedman, you have -- what is
10 your objection? Your objection is to what, page five?

11 MR. FRIEDMAN: Pages 5 through 14. The objection
12 for those pages are the same.

13 THE COURT: And what is the basis of your objection
14 to the defendant using these demonstrative exhibits with
15 Mr. Kiang during his testimony?

16 MR. FRIEDMAN: There are no exhibits associated
17 with these demonstratives, and there are no exhibits that
18 are going to be admitted that support the images that are
19 shown on here. That's one objection.

20 We further object --

21 THE COURT: First of all, demonstrative and
22 exhibits are different. The whole point is that there are
23 certain things that you can use, whether you create them or
24 whether you have them, that you can use as demonstratives
25 as long as it is actually demonstrative, that are not part

1 of the evidence. I'm still not understanding the objection
2 here.

3 MR. FRIEDMAN: That --

4 THE COURT: So, here's the deal.

5 MR. FRIEDMAN: Yes.

6 THE COURT: Obviously, this is something that I
7 can't decide on in a vacuum, because I don't understand the
8 objection. I'm not clear under what context they intend to
9 use the demonstratives, whether it's demonstrative or not.
10 So, you will just need to make your objection at the
11 appropriate time.

12 MR. FRIEDMAN: Thank you, Your Honor.

13 THE COURT: All right.

14 MR. KRASIK: Your Honor, so that we can have some
15 clarity, I'd be happy to give you the context so you can
16 understand.

17 THE COURT: I'll take the context from the stand.

18 MR. KRASIK: Okay. Thank you.

19 THE COURT: Thank you.

20 COURTROOM DEPUTY: All rise. Court's in recess.

21 (Court recessed from 11:55 a.m. to 12:36 p.m.)

22 (Proceedings continued in open court, jury
23 present.)

24 THE COURT: Mr. Simon, call your next witness,
25 please.

1 MR. SIMON: Yes, Your Honor. At this time, the
2 plaintiff calls through video deposition World Wrestling
3 Entertainment, Inc. through Edward Kiang. And this is both
4 parties' designations and it's Plaintiff's Exhibit 157.

5 This one was done by Zoom because of COVID, so we
6 might have to turn the volume up just a bit.

7 THE COURT: Okay.

8 (Whereupon, the videotaped deposition of Edward
9 Kiang, dated August 4, 2020, Plaintiff's Exhibit 157, was
10 played to the jury at this time.)

11 MR. SIMON: Your Honor, at this time, we'd move the
12 admission of Plaintiff's Exhibits 57 and 58.

13 THE COURT: Any objection?

14 MS. CENDALI: No objection, Your Honor.

15 THE COURT: Plaintiff's 57 and 58 are admitted.

16 MR. SIMON: We also used Plaintiff's Exhibit 29,
17 but I believe that's already admitted, Your Honor?

18 THE COURT: Yes.

19 MR. SIMON: Okay. And then also, we'd move the
20 admission of Defendant's Exhibit 85, which was used in
21 that.

22 THE COURT: Any objections?

23 MS. CENDALI: No objection, Your Honor.

24 THE COURT: Defendant's Exhibit 85 is admitted.

25 MR. SIMON: I'm sorry, Your Honor. We have one

1 more. Plaintiff's Exhibit 55.

2 MS. CENDALI: And again, no objection, Your Honor.

3 THE COURT: Plaintiff's Exhibit 55 is admitted.

4 Okay, where are we going -- are we doing
5 counter-designations now or what -- what are we doing?

6 MR. SIMON: That was both sides' designations, Your
7 Honor.

8 THE COURT: Oh, okay. What's your next witness
9 going to be?

10 MR. SIMON: Catherine Alexander will be our next
11 witness.

12 THE COURT: Why don't we go ahead and take a break?
13 I think the --

14 MR. SIMON: Very good, Your Honor.

15 THE COURT: -- the jurors could use a stretch and a
16 break.

17 And in the future, anytime -- I try to take breaks
18 appropriately. But if anybody needs a break at anytime,
19 raise your hand and let us know and we'll take a break.

20 I also notice you guys getting a little cold when
21 they kicked that air back up. We're going to try to --
22 it's hard to regulate. We're going to try to deal with
23 that, as well.

24 why don't we go ahead and break until 1:45.

25 COURTROOM DEPUTY: All rise.

1 (Court recessed from 1:25 p.m. to 1:49 p.m.)

2 (Proceedings continued in open court, jury
3 present.)

4 THE COURT: Plaintiffs may call her next witness.

5 MR. SIMON: Your Honor, the plaintiffs called the
6 plaintiff, Miss Catherine Alexander.

7 THE COURT: All right. Miss Alexander, can you
8 please step forward?

9 (Witness sworn by courtroom deputy.)

10 THE WITNESS: Catherine Ann Alexander.

11 THE COURT: And you may remove your mask, if you
12 wish.

13 THE WITNESS: A-L-E-X-A-N-D-E-R.

14 THE COURT: You may proceed.

15 MR. SIMON: Thank you, Your Honor.

16 * * * * *

17 CATHERINE ALEXANDER,
18 having been first duly sworn, was examined and testified as
19 follows:

20 DIRECT EXAMINATION

21 BY MR. SIMON:

22 Q. Could you state your name and address, please?

23 A. Catherine Ann Alexander, 2451 Delmar Avenue in
24 Granite City, Illinois.

25 Q. And how long have you lived in Granite City?

1 A. About 20 years.

2 Q. All right. And did you grow up in Granite City?

3 A. Yes, sir, I did.

4 Q. Where did you go to high school?

5 A. Granite City Senior High School.

6 Q. Okay. What's your occupation?

7 A. A tattoo artist.

8 Q. And how long have you been a tattoo artist?

9 A. I have been a tattoo artist over 20 years.

10 Q. And tell the jury please how you became a tattoo
11 artist.

12 A. So, for my 18th birthday, that was my gift to
13 myself, was, I got my first tattoo. And, um -- yeah. That
14 was, that was how it all started.

15 Q. Okay. And did you have training after that?

16 A. Yes, sir. I actually became friends with one of
17 the artists that worked at the shop. It was a lengthy
18 tattoo so, you know, we talked, discussed my artistic
19 ability, how I enjoyed drawing, painting, sculpting, bead
20 work, a multitude of different artistic mediums. And he
21 suggested that I might be good at trying to be a tattoo
22 artist.

23 Q. Okay. And how long approximately did you train?

24 A. It's hard to say. You are always learning. So,
25 several years that I observed and helped this individual,

1 Chris Lewis, with, you know, his -- his work. But again,
2 I'm still learning after 20 years, so.

3 Q. Okay.

4 MR. SIMON: Are you okay -- I'm asking the court
5 reporter -- if you are understanding her okay with the
6 mask?

7 THE REPORTER: Yes. Thank you.

8 MR. SIMON: Okay. Very good.

9 Q. (BY MR. SIMON) Now, there's been some -- we've
10 heard of two things in this case. I want to ask you the
11 difference. What's the difference between a tattoo artist
12 and a tattooist?

13 A. So, typically, a tattooist -- and the term that we
14 use, you know, would be someone who can copy, and that's
15 what they do. So, they may come into the shop only knowing
16 how to use an image to put art on skin. But they do not
17 create custom tattoos. They don't generate their own art.

18 Q. And a tattoo artist?

19 A. A tattoo artist would be someone who is
20 accomplished in art. They are familiar with different, you
21 know, ways to put art on skin, and that's what they do, is,
22 is custom art.

23 Q. What is flash?

24 A. Flash is -- I'm sure you have all seen it when you
25 walk into a tattoo shop -- images on the walls or in books

1 that provide something you can choose without you having to
2 bring in your own design. You choose what they have and go
3 from there.

4 Q. What is the process when someone uses flash to put
5 on a tattoo?

6 A. So, flash is something that includes an outline
7 sheet. So, when you choose your design, whether it be
8 black and gray or color, they take the flash sheet and make
9 a direct transfer of that outline and then apply it to the
10 skin with what's called green soap. So, it's a direct
11 transfer.

12 Q. Is it kinda like a stencil?

13 A. It is, sir. Yes.

14 Q. And then the tattoos that you did for Mr. Orton,
15 that you created, were they custom tattoos or were they
16 flash?

17 A. They were all custom.

18 Q. Now, I want to move into when Mr. Orton first came
19 into your tattoo shop. Did you end up inking tattoos that
20 you designed on Mr. Orton?

21 A. Yes, sir, I did.

22 Q. And did those include the five tattoos that are at
23 issue in this case?

24 A. Yes, sir.

25 Q. Did those tattoos exist before you created them?

1 A. No, sir, they did not.

2 Q. Did the designs exist before you created them?

3 A. No, sir, not that I'm aware -- as far as the
4 existing piece? I do not know if that was flash. The
5 tribal addition -- tribal addition tattoo? That's the only
6 one I don't know.

7 Q. Okay. The one on his back that was there before
8 you extended it.

9 A. Yes, sir.

10 Q. What are some of the challenges, when you apply
11 tattoos in a custom way to a person's body?

12 A. So, one of the biggest challenges is body
13 structure. His muscle structure is, is quite unique, so
14 that was definitely something -- if we're speaking about
15 Mr. Orton -- a challenge that would be to put a custom
16 tattoo on him.

17 Q. Do you know approximately when you inked the first
18 one of your tattoos on Mr. Orton?

19 A. I would say around 2002, 2003. It's --
20 approximately. It was a very long time ago, but.

21 Q. Was Mr. Orton famous back then, when he first came
22 in?

23 A. I wouldn't say famous in his own right. Now, St.
24 Louis knows the Orton name. But he, himself, had just
25 began his journey in wrestling.

1 Q. Okay.

2 MR. SIMON: If you could pull up exhibit -- I'm
3 sorry. If you could show Exhibit 11 to Miss Alexander,
4 please.

5 Q. (BY MR. SIMON) Do you recognize that?

6 A. Yes, sir, I do.

7 Q. Okay. What is it?

8 A. That is myself and Randy Orton, and I am tattooing
9 a custom tattoo on him.

10 THE COURT: Hold on for a second. We lost the
11 image off the screen. (Pause.) There you go.

12 MR. SIMON: Your Honor, I'd move the admission of
13 Exhibit 11 -- Plaintiff's Exhibit.

14 MS. CENDALI: No objection.

15 THE COURT: Plaintiff's Exhibit 11 is admitted.

16 MR. SIMON: May I publish it for the jury?

17 THE COURT: And you may publish any exhibit -- once
18 it's admitted, feel free to publish it.

19 MR. SIMON: Thank you, Your Honor.

20 Q. (BY MR. SIMON) So, where was this picture taken?

21 A. That was at a shop called The Pain Station.

22 Q. Okay. And during approximately what time period
23 did you ink the tattoos that you created on Mr. Orton, the
24 five that are the subject of this case?

25 A. Like I said, approximately 2002, 2003, up to late

1 2008, early 2009.

2 Q. Okay.

3 MR. SIMON: Your Honor, I'd move the admission of
4 Exhibit 84.

5 THE COURT: Any objection?

6 MS. CENDALI: What is that, Your Honor? We just
7 did a previous exhibit.

8 THE COURT: I'm not sure.

9 MR. SIMON: We did 11. It's --

10 THE COURT: Mr. Simon, you need to --

11 MR. SIMON: Okay. I'm sorry, Your Honor, I was
12 trying to -- I didn't think there were any objections so I
13 thought --

14 THE COURT: You still need to lay a foundation for
15 the record.

16 MR. SIMON: Please publish for Miss Alexander --

17 MS. CENDALI: I'm sorry, Mr. Simon. Could we have
18 a copy of that? I don't think that's in the binder.

19 MR. SIMON: Exhibit 84? I don't have a copy on
20 hand, but I'll put it up on the screen here for the
21 witness, please.

22 MS. CENDALI: Okay, we'll work with that.

23 Q. (BY MR. SIMON) Do you recognize Exhibit 84,
24 please?

25 A. Yes, sir, I do. That would be the tribal addition

1 tattoo on Mr. Orton's back that I created for him.

2 MR. SIMON: Your Honor, I'd move the admission of
3 Exhibit 84.

4 THE COURT: Any objections, Miss Cendali?

5 MS. CENDALI: No, Your Honor.

6 THE COURT: Plaintiff's Exhibit 84 is admitted.

7 MR. SIMON: Please publish it to the jury.

8 Q. (BY MR. SIMON) So, can you draw on the screen,
9 kinda show what portion was on there before you added what
10 you did?

11 A. I can. And I can say it will be approximate, for
12 the fact that we did extend some of the points and -- you
13 know, from the existing tattoo to make it more graceful.
14 (Indicating.) So, yes, and what I am circling, there were
15 some fine-tuning on the centerpiece as I added the, the
16 addition.

17 Q. Okay. Now, so what you have outlined in red on the
18 screen is what was existing before, when Mr. Orton first
19 came in?

20 A. Yes, sir. But for the shading and white. It's
21 harder to see in this picture, but I did add a gray shade
22 with white between the actual tribal and, and his skin, so.

23 MR. SIMON: Okay. If you could show the witness
24 Exhibit 4, please?

25 Q. (BY MR. SIMON) Do you recognize this exhibit?

1 A. Yes, sir, I do. That is the copyright registration
2 for the tattoo we just looked at.

3 MR. SIMON: Okay. Your Honor, I'd move the
4 admission of Exhibit 4.

5 THE COURT: Any objection?

6 MS. CENDALI: No, Your Honor.

7 MR. SIMON: Please publish it.

8 THE COURT: Okay. Before we get there, Mr. Simon,
9 let me just make a point. We kinda missed it on Exhibit
10 84. But if you are going to have her draw on the screen,
11 try to describe it for the record, because the record's not
12 going to reflect what she outlined.

13 MR. SIMON: I'm sorry, Your Honor. Yes. Yes, Your
14 Honor.

15 THE COURT: Okay.

16 Q. (BY MR. SIMON) So -- I'm sorry. So, just to catch
17 up. Plaintiff's Trial Exhibit 4, which is on the screen
18 now, is your copyright registration for the tattoo we just
19 looked at?

20 A. Correct, sir.

21 MR. SIMON: If we could show the witness, please,
22 Exhibit 83.

23 Q. (BY MR. SIMON) What is Exhibit 83?

24 A. Those are the custom tribal tattoos that I created
25 for Mr. Orton.

1 Q. where on his body?

2 A. They're tattooed on his forearms and upper arms.

3 Q. Okay.

4 MR. SIMON: Your Honor, I'd move the admission of
5 Exhibit 83.

6 MS. CENDALI: No objection.

7 THE COURT: Plaintiff's Exhibit 83 is admitted.

8 MR. SIMON: Please publish it for the jury.

9 (Pause.) Okay. Let's -- please show the plaintiff
10 Plaintiff's Exhibit 80.

11 Q. (BY MR. SIMON) Do you recognize Exhibit 80?

12 A. Yes, sir, I do. It's the custom rose tattoo I had
13 created for Mr. Orton, tattooed on his left forearm, with
14 his daughter's name, Alanna, and her birth date in Roman
15 numerals.

16 MR. SIMON: Okay. Your Honor, I'd move the
17 admission of Exhibit 80.

18 MS. CENDALI: No objection.

19 THE COURT: Plaintiff's Exhibit 80 is admitted.

20 MR. SIMON: Please publish it for the jury.

21 (Pause.) Now, I'd like to show the witness Plaintiff's
22 Exhibit 2, please?

23 Q. (BY MR. SIMON) Do you recognize Exhibit 2, Miss
24 Alexander?

25 A. Yes, sir. That's the copyright registration for

1 the tattoo that we just saw.

2 MR. SIMON: Your Honor, I'd move the admission of
3 Exhibit 2.

4 THE COURT: Any objection?

5 MS. CENDALI: No objection.

6 MR. SIMON: Please publish it for the jury.

7 THE COURT: Plaintiff's Exhibit 2 is admitted.

8 MR. SIMON: I'm sorry, Your Honor. Apparently, I
9 missed one.

10 If you could show the witness Plaintiff's
11 Exhibit 5, please.

12 Q. (BY MR. SIMON) Do you recognize Plaintiff's
13 Exhibit 5?

14 A. Yes, sir, I do. This is the copyright registration
15 for the tribal designs we previously looked at, for his
16 forearms and upper arms.

17 MR. SIMON: Your Honor, I'd move the admission of
18 Exhibit 5.

19 MS. CENDALI: No objection.

20 THE COURT: Plaintiff's Exhibit 5 is admitted.

21 MR. SIMON: Please publish it for the jury.

22 (Pause.) And if you could show the witness, please,
23 Exhibit 82, Plaintiff's Exhibit 82.

24 Q. (BY MR. SIMON) Do you recognize these -- this
25 picture?

1 A. Yes, sir, I do. Those are the custom gray shade
2 skulls I created for Mr. Orton and tattooed them on both
3 arms.

4 MR. SIMON: Your Honor, I'd move the admission of
5 Plaintiff's 82.

6 MS. CENDALI: No objection.

7 THE COURT: Plaintiff's Exhibit 82 is admitted.

8 MR. SIMON: If you could show the witness, Mr.
9 Zack, please, Plaintiff's Exhibit 3.

10 Q. (BY MR. SIMON) Do you recognize Exhibit 3?

11 A. Yes, sir, this is the copyright registration for
12 the skull tattoos we just looked at.

13 MR. SIMON: Your Honor, I'd move the admission of
14 Exhibit 3.

15 MS. CENDALI: No objection.

16 THE COURT: Plaintiff's Exhibit 3 is admitted.

17 MR. SIMON: Please publish it for the jury.

18 (Pause.) Mr. Zack, if you could show the witness Exhibit
19 81, please.

20 Q. (BY MR. SIMON) Do you recognize Exhibit 81?

21 A. Yes, sir, I do. This is the dove that I created
22 and tattooed for Mr. Randy Orton on his left arm.

23 MR. SIMON: I'd move the admission of Exhibit 81.

24 MS. CENDALI: No objection.

25 THE COURT: Plaintiff's Exhibit 81 is admitted.

1 MR. SIMON: If you could please publish it.

2 (Pause.) If you could show the witness Exhibit 1, please.

3 Q. (BY MR. SIMON) Do you recognize Exhibit 1?

4 A. Yes, sir. This is the registration for copyright
5 for the dove that we just looked at, the dove tattoo.

6 MR. SIMON: Your Honor, I'd move the admission of
7 Exhibit 1.

8 MS. CENDALI: No objection.

9 THE COURT: Plaintiff's Exhibit 1 is admitted.

10 MR. SIMON: If you could publish it for the jury.
11 (Pause.) We can take down Exhibit 1.

12 Q. (BY MR. SIMON) So, I want to ask you a few
13 questions about the tattoos we just looked at, those five.
14 Did you create them?

15 A. Yes, sir.

16 Q. Who owns the design?

17 A. I own the designs.

18 Q. Did you get paid for inking them on Mr. Orton?

19 A. I got paid for the labor of tattooing the designs
20 on Mr. Orton.

21 Q. Did that payment include ownership of the design?

22 A. The ownership did not transfer. The ownership is
23 mine.

24 MS. CENDALI: [Inaudible.]

25 THE COURT: I'm sorry?

1 MS. CENDALI: Objection, calls for legal
2 conclusion.

3 THE COURT: Sustained.

4 Q. (BY MR. SIMON) All right. Did you and Mr. Orton
5 ever have any discussion about who owned --

6 MS. CENDALI: Your Honor, may I move to strike then
7 that last question and answer?

8 THE COURT: The last question and answer will be
9 stricken from the record, and the jury is instructed to
10 disregard the same.

11 Q. (BY MR. SIMON) Did you and Mr. Orton ever have a
12 discussion about ownership of the designs of these tattoos?

13 A. Yes. He said I created the designs and if someone
14 were to ask for me to tattoo them on their body, he said,
15 *Do what you want with them, you made them, you can do what*
16 *you want.*

17 Q. Okay.

18 MS. CENDALI: Objection, Your Honor, it's hearsay.

19 THE COURT: Overruled.

20 Q. (BY MR. SIMON) At the time you inked these -- your
21 tattoos on Mr. Orton, did you know that character models of
22 Mr. Orton with copies of your tattoos would appear in video
23 games?

24 A. No, sir, I did not.

25 Q. At the time you inked these tattoos on Mr. Orton,

1 did you know that copies of your tattoos, on a different
2 character -- not Mr. Orton, a different character model --
3 would appear in video games?

4 A. Definitely not.

5 Q. At the time you inked these tattoos on Mr. Orton,
6 did Mr. Orton tell you that a character model of him,
7 including your tattoos, would appear in video games?

8 A. No, sir, he did not.

9 Q. Did Mr. Orton at that time tell you that he
10 intended to authorize third parties to copy the tattoos
11 into video games?

12 A. No, sir, he never said that.

13 Q. Okay.

14 MR. SIMON: I'd like to now pull up Plaintiff's --
15 Take-Two's demonstrative used in this morning's open -- in
16 the opening statement? This is plaintiff's demonstrative
17 exhibit used in opening statement -- I'm sorry.

18 This is Defendant Take-Two's demonstrative exhibit
19 used in opening statement. And go to slide 7, please.

20 Q. (BY MR. SIMON) Were you in the courtroom
21 yesterday?

22 A. Yes, sir.

23 Q. And you heard the opening statement and what was
24 said about this slide here?

25 A. I did.

1 Q. Okay. Prior to yesterday, had you ever seen a 2002
2 video game that included a character model of Randy Orton?

3 A. No, sir, I did not.

4 MR. SIMON: If you could go to slide 8, please.

5 Q. (BY MR. SIMON) Prior to yesterday, did you ever
6 see a 2003 video game -- sorry -- prior to yesterday, had
7 you ever heard of a 2003 video game that included a
8 character model of Randy Orton?

9 A. No, sir, I did not.

10 MR. SIMON: Go to slide 8 [sic], please.

11 Q. (BY MR. SIMON) Prior to yesterday, had you ever
12 seen a 2004 video game that included a character model of
13 Randy Orton?

14 A. No, sir, I did not.

15 MR. SIMON: I'm sorry. My -- I'm being told this
16 hasn't been published to the jury.

17 May I publish it to the jury, Your Honor? The
18 demonstrative exhibit that was already shown to the jury.

19 THE COURT: Miss Cendali?

20 MS. CENDALI: We don't have -- in light of Your
21 Honor -- we have no objection.

22 THE COURT: Yes, you may.

23 MR. SIMON: I'm sorry. So, if we could go back to
24 slide 7.

25 So, you already testified about that. I'm just

1 going to loop through them for the jury.

2 And slide 8, please. (Pause.) And slide 9,
3 please.

4 THE COURT: These were all shown during opening
5 statements; is that correct?

6 MR. SIMON: Yes, Your Honor.

7 Q. (BY MR. SIMON) And this is slide 9. I don't think
8 I asked you about slide 9. Prior to yesterday, had you
9 ever seen a 2004 video game that included a character model
10 of Randy Orton?

11 A. No, sir.

12 MR. SIMON: Go to slide 10, please.

13 Q. (BY MR. SIMON) Prior to yesterday, had you ever
14 seen a video game from 2005 that included a character model
15 of Randy Orton?

16 A. No, sir.

17 MR. SIMON: Go to slide 11, please.

18 Q. (BY MR. SIMON) Prior to yesterday, had you ever
19 seen a 2006 video game that included a character model of
20 Randy Orton?

21 A. No, sir.

22 MR. SIMON: Go to slide 12, please.

23 Q. (BY MR. SIMON) Prior to yesterday, had you ever
24 seen a 2007 video game that included a character model of
25 Randy Orton?

1 A. No, sir.

2 MR. SIMON: Go to slide 13.

3 Q. (BY MR. SIMON) Prior to yesterday, had you ever
4 seen a 2008 video game that included a character model of
5 Randy Orton?

6 A. No, sir, I did not.

7 MR. SIMON: Go to the next slide, please.

8 Q. (BY MR. SIMON) Prior to yesterday, had you ever
9 seen a 2009 video game that included a character model of
10 Randy Orton?

11 A. No, sir, I have not.

12 MR. SIMON: Next slide, please.

13 Q. (BY MR. SIMON) Prior to yesterday, had you ever
14 seen a 2010 video game that included a character model of
15 Randy Orton?

16 A. No, sir.

17 MR. SIMON: And the next slide, please? (Pause.)
18 Was there one for 2011? I'm sorry, did we jump, Mr. Zack?

19 VIDEO TECHNICIAN: No.

20 MR. SIMON: Okay. So, go to slide 17.

21 Q. (BY MR. SIMON) Now, what's shown in slide 17 here
22 are the video games that are at issue in this case; right?

23 A. Yes.

24 Q. When was the first time you became aware of any of
25 the video games that are the subject of this litigation?

1 A. 2016.

2 Q. Okay.

3 MR. SIMON: And if we could go to slide 18, please.

4 Q. (BY MR. SIMON) Now, Miss Alexander, this is a
5 photograph of Randy Orton. Do you have any objection to
6 Mr. Orton appearing in photographs?

7 A. No, sir, not at all.

8 MR. SIMON: Okay. If we could go to it WWE's
9 demonstratives used in opening statement, please, and
10 publish them for the jury. And go to slide 17.

11 Q. (BY MR. SIMON) You were here during the opening
12 statement and you saw this, that was displayed?

13 A. Correct, sir.

14 Q. All right. Prior to yesterday, had you ever seen
15 these THQ video games that are shown with character models
16 of Randy Orton?

17 A. No, sir, I had not.

18 MR. SIMON: Go to slide 15, please. And you can
19 just list all of them.

20 Q. (BY MR. SIMON) Now, were you here in opening when
21 there was a discussion about your missed opportunities to
22 tell Mr. Orton he needed certain of your permissions? Do
23 you remember that?

24 A. I do remember it, sir.

25 Q. Okay. Why didn't you tell Mr. Orton he needed your

1 permission to be photographed?

2 A. He doesn't need my permission to be photographed.

3 Q. why didn't you tell him he needed your permission
4 to be videotaped?

5 A. He does not need my permission to be videotaped.

6 Q. why didn't you tell him he needs your permission to
7 show his body in public?

8 A. He does not need my permission to show his body in
9 public.

10 Q. Does Mr. Orton need any permission from you to do
11 whatever he wants with, to his body and with his body?

12 A. Absolutely not. He can do whatever he wants with
13 that body.

14 MR. SIMON: Okay. You can take that down, please.

15 If you could pull up Plaintiff's Exhibit 153,
16 please, and start at 15 and go to 30 -- I'm sorry.

17 Your Honor, this exhibit has been admitted already.
18 so, if we can publish it for the jury, as well.

19 COURTROOM DEPUTY: Do you need sound for this?

20 MR. SIMON: No, I do not need sound. Thank you.

21 (Video playing.)

22 Q. (BY MR. SIMON) Okay. Do you recognize the game
23 character on Exhibit 153 that's shown in the screen at
24 00:21 -- I'm sorry, 00:22?

25 (Video playing.)

1 MR. SIMON: If you could pause it, please.

2 A. Recognize it?

3 Q. (BY MR. SIMON) It's -- yes. Do you know who that
4 is? Who that's a depiction of?

5 A. I don't think it's a depiction of anyone.

6 Q. Okay. Is that a game character of Randy Orton in
7 the video game?

8 A. No, sir.

9 MR. SIMON: Okay. Now, if you could go to 40
10 seconds, please?

11 (Video playing.)

12 Q. (BY MR. SIMON) Do you recognize what's shown in the
13 Exhibit 153 at 40 seconds?

14 A. That is a copy of the tribal addition tattoo that I
15 created for Mr. Orton.

16 MR. SIMON: Okay. If you could play from 40 to 55
17 of Plaintiff's Exhibit 153, please?

18 (Video playing.)

19 Q. (BY MR. SIMON) Do you recognize what's shown in 153
20 at 55 seconds, on the left arm of the character model?

21 A. I do, sir.

22 Q. What are they?

23 A. Those are the custom tattoos that I created for
24 Randy Orton, but they are copied and put on this
25 mannequin-like character in the video game.

1 MR. SIMON: Okay. And if you can go to 1:08,
2 please, Zack?

3 Q. (BY MR. SIMON) Do you recognize what's shown at
4 1:08 of Exhibit 153?

5 A. I do, sir. Those are copies of the custom tattoos,
6 the skulls and some of the tribal, that I created for Mr.
7 Orton also, applied to this blank character.

8 MR. SIMON: Okay. And if you go to 1:19, please,
9 Mr. Zack.

10 Q. (BY MR. SIMON) And what do you see here, ma'am?

11 A. I see copies of the tattoos that I created on this
12 character. However, they have been grossly altered, the
13 color.

14 Q. Did you ever give anyone permission to include
15 these tattoos in this video game?

16 A. Never.

17 MR. SIMON: All right. If we could go to Exhibit
18 154, please, which is already admitted, and go to 5
19 minutes, 4 seconds.

20 Q. (BY MR. SIMON) And this is video game, ma'am, WWE
21 2K17. Do you recognize what's shown here at 5:04 of
22 Exhibit 154?

23 A. Yes, sir, I do.

24 Q. What is it?

25 A. It appears to be the copy of Randy Orton for the

1 video game, with copies of my custom tattoos that I had
2 created also on the character's skin.

3 Q. And did you ever give anyone permission to include
4 your tattoos in this video game?

5 A. No, sir, never.

6 MR. SIMON: And if you'll go to 7:27, please.

7 Q. (BY MR. SIMON) What is that a picture of -- or
8 what's depicted there at 7:27?

9 A. That's a copy of the tattoo I had created for Mr.
10 orton. It looks like it's on, also, the wrestling
11 character depicted in the game. And also, you could see
12 some of the other copyrighted work.

13 Q. All right. Now, for all the tattoos we just saw --

14 MR. SIMON: You can take that down, please.

15 Q. (BY MR. SIMON) For all the tattoos we just saw,
16 both the ones on the end game character that represents
17 Randy Orton and the character that does not look like Randy
18 Orton, did you ever give permission to anyone to copy the
19 tattoos into the video games?

20 A. No, sir. Never.

21 Q. Did you ever do or say anything to indicate to
22 anyone that they had permission to copy those designs in
23 video games?

24 A. No, sir, definitely not.

25 Q. Did you ever say or do anything to indicate you

1 were relinquishing your copyrights in those designs?

2 A. No, sir.

3 MS. CENDALI: Objection, calls for legal
4 conclusion, and misstates the law.

5 THE COURT: I did hear a statement of the law, but
6 overruled.

7 Q. (BY MR. SIMON) I'd like to switch gears now. Have
8 you ever interacted in the past with the defendants
9 regarding your tattoos?

10 A. Yes, sir, I did.

11 Q. Please tell the jury about when it happened.

12 A. Well, it was 2009.

13 Q. That's fine. I just wanted you to say when, first,
14 so they have the date.

15 A. Oh, okay.

16 Q. Now, tell them what happened.

17 A. I had heard someone -- acquaintance, friend, I'm
18 not sure -- tell me there may be some nylon sleeves created
19 with my custom designs that I had tattooed on, on Mr.
20 orton. You know, the pull-on kind of sleeves that appear
21 as though you have the tattoos. So, I had -- that was the
22 first I had heard of anything like that.

23 I Googled the number for WWE Legal in Stanford,
24 Connecticut -- you can actually do that -- and called the
25 number to address that issue and see what they had to say.

1 Q. Did someone answer?

2 A. Yes, sir, they did.

3 Q. And what did -- what did you say to them?

4 A. I, you know, introduced myself as Catherine
5 Alexander. I am the tattoo artist for Mr. Randy Orton. I
6 mentioned these possible products that they may come out
7 with, asked them if that was in fact a thing, and expressed
8 to them that if they were to do that, I gave them no
9 permission to use my custom designs on that merchandise.

10 Q. Okay. And did you tell them that you had
11 copyrights?

12 A. No.

13 Q. Okay. And did you give them any permission to use
14 your designs?

15 A. I did not. They were actually very condescending
16 on the phone. When they came across as they did, I said,
17 *well, I'm sorry that you feel as though I'm some stupid*
18 *hick from the Midwest and I don't know any better.*

19 And that was the end of the phone call. I didn't
20 feel the need to speak with them any further after that
21 conversation.

22 Q. Did you say anything about whether you were willing
23 to negotiate a license agreement?

24 A. If they were to come forth with anything, that was
25 the only way. I said I would be willing to negotiate, yes,

1 a percentage of their revenue if they were to -- want to
2 create a product.

3 Q. Okay. Now, in the interest of time, I'm going to
4 talk about several games that were mentioned yesterday.
5 I'm just going to name them, first, and then I'm going to
6 ask you some questions.

7 A. Okay.

8 Q. WWE Smack Down Shut Your Mouth game from 2002. Had
9 you ever heard of that one before yesterday?

10 A. No, sir.

11 Q. WWE Smack Down Here Comes the Pain from -- Pain
12 Game from 2003. Had you ever heard of that game before
13 yesterday?

14 A. No, sir.

15 Q. The game WWE Smack Down versus Raw 2004. Had you
16 ever heard of that game before yesterday?

17 A. No, sir.

18 Q. WWE Smack Down Raw 2006. Had you ever heard of
19 that game before yesterday?

20 A. No, sir.

21 Q. WWE Smack Down versus Raw 2007. Had you ever heard
22 of that game before yesterday?

23 A. No, sir.

24 Q. WWE Smack Down versus Raw 2008. Had you ever heard
25 of that game before yesterday?

1 A. No, sir.

2 Q. WWE Smack Down versus Raw 2009. Had you ever heard
3 of that game before yesterday?

4 A. No, sir.

5 Q. WWE Smack Down versus Raw 2010. Had you ever heard
6 of that game before yesterday?

7 A. No, sir.

8 Q. And, finally, WWE Smack Down versus Raw 2011. Had
9 you ever heard of that game before yesterday?

10 A. No, sir.

11 Q. All right. So, for all those games I just
12 mentioned, they were -- they were PlayStation 2 games,
13 okay? Had you ever played the game?

14 A. No, sir.

15 Q. Ever seen the game played?

16 A. No.

17 Q. Have you even ever owned a PlayStation 2?

18 A. I have never owned a video game console.

19 Q. And had you ever seen a character model of Randy
20 Orton in any of those games?

21 A. No, sir.

22 Q. All right. Now, you said you first learned about
23 the infringing games in this case in approximately 2016?

24 A. Correct, sir.

25 Q. And the point was made, you filed the lawsuit in

1 2018. Was there anything between 2016 and 2018 that
2 happened to you, physically, that prevented you from taking
3 action?

4 A. Yes, sir. Unfortunately, I had a bi-level spinal
5 fusion in early 2017, with some complications. And also, a
6 car accident following that, in 2018.

7 Q. Okay. There was some discussion about whether you
8 -- you filed a lawsuit. You didn't call WWE or Take-Two.
9 Why not? In 2018, before you filed suit.

10 A. They were so dismissive and ugly on the previous
11 phone call, I didn't feel as though they would be
12 receptive.

13 Q. Okay. And how did you find out? A friend -- I
14 think you said a friend mentioned about -- let me ask you
15 this. How did you find out about the video games that are
16 the subject of this case, and your tattoos appearing in
17 them?

18 A. An associate actually had mentioned that the video
19 game was extremely realistic, and my tattoos that were
20 depicted were amazing.

21 Q. And what -- did you do any investigation on your
22 own to confirm that?

23 A. Well, yes. I got on the computer and Googled only
24 a portion, and it was the walk-out portion of the game
25 where Mr. Orton is shown approaching the ring for his

1 performance.

2 Q. Now, why did you file applications to register your
3 copyrights in 2018?

4 A. It was necessary to go forth with the lawsuit.

5 Q. Okay. Now, let me ask you: what are you asking
6 for, from this jury, in this suit?

7 A. You know --

8 MS. CENDALI: Objection, Your Honor.

9 THE COURT: I'm sorry?

10 MS. CENDALI: Objection. This isn't the time to be
11 asking the jury for anything.

12 THE COURT: Overruled.

13 A. I am asking for what's fair. These are large
14 corporations that used my custom creations for their
15 benefit, without any compensation at all, and I just want a
16 very small piece of a very big pie.

17 MR. SIMON: Your Honor, may I have one moment?

18 THE COURT: Yes.

19 (Pause.)

20 MR. SIMON: That's all I have at this time, Your
21 Honor.

22 THE COURT: Miss Cendali.

23 MS. CENDALI: Your Honor, may I approach the
24 witness?

25 THE COURT: Yes.

1 MS. CENDALI: May I take my mask off?

2 THE COURT: You may.

3 CROSS-EXAMINATION

4 BY MS. CENDALI:

5 Q. Good afternoon, Ms. Alexander.

6 A. Good afternoon.

7 Q. I guess we last met back in 2019, when I took your
8 deposition. Do you remember that?

9 A. Yes, ma'am, I do.

10 Q. Now, Ms. Alexander, you knew during the time that
11 you were inking Mr. Orton that he was a famous wrestler;
12 right?

13 A. Not in the beginning.

14 Q. Well, in the beginning, you knew that he was going
15 to wrestling school; right?

16 A. Yes, ma'am, I did.

17 Q. Yeah. And it took more than five tattoo sessions
18 to ink those large tattoos on Mr. Orton; right?

19 A. Yes, ma'am, it did.

20 Q. So, you were spending a lot of time with him;
21 right?

22 A. To a degree, for the work.

23 Q. Yeah. And you also were seeing him socially, too;
24 right?

25 A. At times, yes.

1 Q. And during those sessions, you talked to Mr. Orton
2 about his wrestling career; right?

3 A. On occasion.

4 Q. You understood that he had gotten into the WWE;
5 right?

6 A. Yes, ma'am.

7 Q. And you knew that he -- even before he got in the
8 WWE -- he was excited. He told you from the beginning, he
9 wanted to be a professional wrestler. Right?

10 A. I don't remember him telling me prior to anything.
11 It was -- when I first tattooed him, we were discussing his
12 wrestling school where he had just been at.

13 Q. Ms. Alexander, Mr. Orton told you about his desire
14 to be a professional wrestler; correct?

15 A. Correct. Yes. That's why he was going to
16 wrestling school.

17 Q. Okay. And did you ever discuss with Mr. Orton that
18 he had won his first WWE championship in 2004?

19 A. No, ma'am.

20 Q. Did you know he had won the championship in 2004?

21 A. Not that I recall.

22 Q. Well, Ms. Alexander, you knew by 2008 that Mr.
23 Orton was a very successful professional wrestler; right?

24 A. He became very successful, yes, ma'am.

25 Q. And you also knew that when you were inking Mr.

1 Orton, that as a professional wrestler he would appear in
2 media showing his tattoos; right?

3 A. Correct.

4 Q. You watch Mr. Orton wrestle on television; right?

5 A. Occasionally.

6 Q. And you knew that he was on television all the
7 time, by 2008; right?

8 A. Yes, ma'am.

9 Q. And wasn't part of the point, Mr. Orton's point in
10 getting his tattoos, so he would look good when he was on
11 TV?

12 A. I would assume so.

13 Q. And didn't you even have a conversation with Mr.
14 Orton about how the tattoos you inked on him would look
15 good on television?

16 A. Yes, they do accent his muscle structure.

17 Q. And you knew when you were inking Mr. Orton that he
18 would appear on merchandise showing his tattoos; right?

19 A. Yes, ma'am.

20 Q. And you knew he would be in magazines and on the
21 internet; right?

22 A. Yes, ma'am.

23 Q. And you knew that when he appeared in costume, the
24 tattoos would be visible; right?

25 A. Absolutely.

1 Q. Is it fair to say, a wrestler typically wrestles in
2 kind of a bathing suit, trunk-type outfit?

3 A. That's part of the job.

4 Q. Maybe part of the attraction, too; right?

5 A. Quite possibly.

6 Q. Yeah. And tattoos -- would you agree with me that
7 tattoos are part of what makes Mr. Orton look like Mr.
8 Orton?

9 A. Yes, ma'am.

10 Q. It's part of his persona; correct?

11 A. It is.

12 Q. In fact, would you agree with me that Mr. Orton
13 wouldn't look as much like himself without his tattoos?

14 A. Now that they're there, it's hard to imagine Randy
15 without his tattoos.

16 Q. Now, in the years from around 2002, 2003, to 2008,
17 2009, when you were inking Mr. Orton, you never told him
18 that you expected to be compensated when he appeared in the
19 future with his tattoos; right?

20 A. We never had that discussion.

21 Q. So, you never told him that you needed to go back
22 -- he needed to go back to you for permission or
23 compensation for showing what was on his skin; correct?

24 A. No.

25 Q. And you have inked thousands of tattoos on clients

1 in your career; right?

2 A. Yes, ma'am, I have.

3 Q. And you never told any client, including Mr. Orton,
4 that they needed your permission to appear on a T-shirt
5 showing the tattoos you inked; right?

6 A. No, ma'am.

7 Q. And you never told a client, including Mr. Orton,
8 that they needed your permission to appear in a photograph
9 showing the tattoos you inked; right?

10 A. No, ma'am.

11 Q. And you never told any client, including Mr. Orton,
12 that they needed to pay you before posting pictures of
13 themselves with their tattoos on social media; right?

14 A. Absolutely not.

15 Q. And you never told a client, including Mr. Orton,
16 they needed your permission to appear on television showing
17 the tattoos you inked; right?

18 A. That's correct.

19 Q. And you never told any client, including Mr. Orton,
20 that they needed your permission to be depicted in a video
21 game showing their tattoos; right?

22 A. No, I never told anyone that.

23 Q. Yeah. And you never told a client, including Mr.
24 Orton, that they needed to pay you before they were
25 depicted in a video game showing their tattoos; right?

1 A. No, I have never told anyone that.

2 Q. In fact, you understand that when a client leaves
3 your tattoo shop, the client's free to go about their life
4 without going back to you for permission to show their
5 tattoos; correct?

6 A. To show their tattoos on their physical body? No,
7 they don't need my permission.

8 Q. And you never told any client, including Mr. Orton,
9 that you own copyrights in their tattoos; right?

10 A. I was never asked.

11 Q. Does -- is Mr. Orton a copyright expert?

12 A. I don't believe he is. He might be by now. He's
13 very smart.

14 Q. So, did you tell Mr. Orton or any of your clients
15 that you own copyrights in their tattoos?

16 A. I was never asked.

17 Q. My question is different. Did you tell any client,
18 including Mr. Orton, that you own copyrights in their
19 tattoos?

20 A. No, ma'am.

21 Q. Now, if you had told Mr. Orton before you inked him
22 that he would have to come back to you for permission and
23 pay you money in the future, that -- would you agree with
24 me that that would have given him an opportunity to maybe
25 select a different tattoo artist?

1 A. Pay him money for what? Could you please clarify?

2 Q. Sure. Let me try it again.

3 would you agree with me that, if you had told Mr.
4 Orton that he would have to come back to you in the future
5 for permission or to pay you money, in some way he might
6 want to show his body, he could have then said, *Oh, thanks*
7 *for letting me know, I'm going to go to a different tattoo*
8 *artist.*

9 A. I'm still not sure -- you didn't clarify in what
10 way he would -- if it's his body? No, I wouldn't request
11 that he pay me to show his body.

12 Q. well, his body is being shown in WWE 2K games;
13 right?

14 A. That's not his body.

15 Q. would you say it looks like his body?

16 A. From what I'm aware, they recreated that character
17 to look very close to what they could achieve with video
18 game art.

19 Q. And if you had told -- you never told Mr. Orton
20 that there would be some circumstance in the future where
21 he would need to go back to you for permission to authorize
22 people to show his likeness; right? You never told him
23 that; correct?

24 A. No, I didn't speculate on anything that may happen
25 in the future.

1 Q. And therefore, you never gave Mr. Orton any warning
2 that in the future, 20 years later, you might come back and
3 file a lawsuit against him; right?

4 A. No --

5 MR. SIMON: Objection.

6 A. -- it would be impossible.

7 THE COURT: I'm sorry?

8 MR. SIMON: Objection. There's no lawsuit against
9 Mr. Orton here.

10 THE COURT: Sustained.

11 Q. (BY MS. CENDALI) You never gave Mr. Orton the
12 ability to seek out a different tattooist by letting him
13 know that in the future you might demand additional
14 payment; correct?

15 A. I'm not asking for additional payment from Mr.
16 Orton.

17 Q. You understand that Mr. Orton has licensed his
18 likeness to WWE and Take-Two?

19 A. That's between him, WWE, and Take-Two.

20 Q. Right. You understand that that's the case though,
21 right?

22 A. I do now.

23 Q. Now, in your experience in the tattoo field,
24 clients and tattooists don't sign agreements about
25 copyright issues; right?

1 A. Not in any shop that I have worked in.

2 Q. And the only agreement you ever had Mr. Orton sign
3 was a health form required by the State of Missouri;
4 correct?

5 A. Correct, the standard state health certificate.

6 MS. CENDALI: Your Honor, I'd like to show to the
7 witness, the Court, and opposing counsel what has been
8 previously marked as Defendant's Exhibit 103.

9 MR. SIMON: No objection, Your Honor.

10 Q. (BY MS. CENDALI) Is this the -- do you have it in
11 front of you, Ms. Alexander?

12 A. Yes, ma'am, I do.

13 Q. Is this the State of Missouri's required form to be
14 given to someone receiving a tattoo?

15 A. Yes, it appears to be.

16 Q. And did you have Randy Orton sign one of these
17 forms for you?

18 A. It depends on which shop he was being tattooed at.
19 I didn't always control the desk.

20 Q. He signed one of these forms for you at The Pain
21 Station tattoo shop; correct?

22 A. Yes. Correct.

23 MS. CENDALI: I move Defendant's Exhibit 103 in
24 evidence.

25 MR. SIMON: No objection.

1 THE COURT: Defendant's Exhibit 103 is admitted.

2 MS. CENDALI: Permission to publish?

3 THE COURT: You may.

4 Q. (BY MS. CENDALI) So, there's nothing in this form
5 that tells tattoo people they need to go back to their
6 tattoo artist before showing their tattoos in media;
7 correct?

8 A. The State of Missouri does not require that on the
9 form.

10 Q. The form deals with health issues; right?

11 A. Correct, ma'am.

12 Q. And just to be clear, you never told Mr. Orton he
13 couldn't authorize others, like WWE, to show his likeness
14 either; right?

15 A. Can you define likeness?

16 Q. What he looks like. You never told Mr. Orton, you
17 can't tell WWE to show what he looks like to people; right?

18 A. I never told him that, no.

19 Q. Now, I believe you said on direct that there's --
20 that there -- that Mr. Orton doesn't need your permission
21 to appear in a photograph; right?

22 A. Correct.

23 Q. And do you believe he doesn't need your permission
24 to appear on television, too?

25 A. No, ma'am, he does not.

1 Q. And what about on merchandise like T-shirts? Does
2 he need your permission for that?

3 A. If it's a photograph of him, no.

4 Q. well, suppose it's a -- a T-shirt that shows him,
5 that is not made directly from a photograph of him. would
6 that need your permission?

7 A. It would depend on the circumstance.

8 Q. So, sometimes he might need your permission to --
9 for his likeness, his -- what he looks like -- to be on a
10 T-shirt. Is that your point?

11 A. If it's a copy or it's been altered in any way,
12 yes.

13 Q. So, anything but a photograph on a T-shirt, you
14 think, needs your permission; is that right?

15 A. If my custom designs are represented on that
16 merchandise and they are not photographs of Mr. Orton
17 directly, yes.

18 Q. You have been to WWE events, haven't you?

19 A. Only a couple.

20 Q. And you know that they sell T-shirts at those
21 events; right?

22 A. I have seen the T-shirt booths.

23 Q. Right. So, when you were inking Mr. Orton, you
24 knew he would likely be on T-shirts; right?

25 A. Correct.

1 Q. And you never said, *By the way, there's only some*
2 *T-shirts that you can be on, without paying me.* Right?

3 A. No, ma'am.

4 Q. Now, what is it -- what's the distinction you are
5 making, what's the difference in your mind between why it's
6 okay for Mr. Orton to be in a photograph or on television
7 without your permission, but in a video game or a T-shirt
8 that looks like him, then he needs to pay you?

9 A. Because in the video games, that is not Mr. Orton.
10 That is a recreation of Mr. Orton with my custom designs.

11 Q. It's recreation that looks a lot like him; right?

12 A. They may do a good job at rendering what he looks
13 like, but that still doesn't make it Mr. Orton.

14 Q. In fact, isn't it true that in a video game, Mr.
15 Orton's appearance is not altered in any way?

16 A. Really, that's not what it appeared whenever the
17 testimony from the computer experts were.

18 Q. well, I'm asking you because you looked at the
19 games; right?

20 A. I did.

21 Q. So, isn't it true that, in your view, Mr. Orton's
22 appearance is not altered in any way by the WWE 2K Games?

23 A. My observation is, in the one video game it looks
24 like his nose is broken. So, I don't think that that's a
25 very direct representation or realistic representation.

1 MS. CENDALI: Your Honor? I direct opposing
2 counsel to Catherine Alexander's deposition transcript at
3 page 173, lines 16 to 20.

4 Q. (BY MS. CENDALI) Ms. Alexander, as we mentioned,
5 you were deposed in connection with this case; right?

6 A. Correct.

7 Q. You were under oath; correct?

8 A. Yes, ma'am.

9 Q. You swore to tell the truth in that deposition;
10 correct?

11 A. Yes, ma'am.

12 Q. And you did tell the truth in that deposition;
13 right?

14 A. Correct.

15 Q. And after that deposition, you received a copy of
16 the transcript; right?

17 A. Yes, ma'am.

18 Q. And you had an opportunity to review and make
19 corrections; correct?

20 A. I did.

21 Q. And in fact, you did make corrections; right?

22 A. I don't recall, but.

23 Q. Do you remember that you signed a notarized copy of
24 the transcript?

25 A. I didn't have anything notarized. I don't remember

1 if it was notarized.

2 Q. You don't know whether your counsel did that?

3 A. I don't, no.

4 Q. All right. At your deposition, I asked you the
5 following question and you gave the following answer.

6 Question: "Is Mr. Orton's appearance altered in
7 any way by WWE 2K video games?"

8 Answer: "Other than him appearing in digital form,
9 unfortunately, no."

10 was that your testimony at the time?

11 A. I recall, yes, it was.

12 Q. Now, would you agree that the tattoos were included
13 in WWE 2K in order to make Mr. Orton's character in the
14 game resemble Mr. Orton in real life?

15 MR. SIMON: Objection, Your Honor, calls for
16 speculation.

17 THE COURT: Sustained.

18 MS. CENDALI: Your Honor, we have an RFA on this
19 point. Can I read it now?

20 THE COURT: I'd like to see it, first.

21 MS. CENDALI: Can we have a copy of Request for
22 Admission No. 38, which is labeled as Defendant's Exhibit
23 94, page 16.

24 Can we give a copy to the Court?

25 THE COURT: You can hand it to Miss Hurst.

1 MR. SIMON: I'm sorry. What number, please?

2 MS. CENDALI: It's Defendant's Exhibit 94, Request
3 for Admission, page 16, No. 38.

4 (Off the record.)

5 THE COURT: I have -- this is Document 95, that I
6 have. You are reading from -- your reference is to
7 Document 94?

8 MS. MEANS: That was my fault, Your Honor.

9 (Off the record.)

10 THE COURT: Are you referring to 94 in the docket
11 citation? Because the sticker says 94 down --

12 MS. CENDALI: Your Honor, it's Exhibit 94, not
13 Document 95. I think that's the confusion.

14 THE COURT: So, Exhibit 94 --

15 MS. CENDALI: It's Exhibit 94 and it's Request for
16 Admission No. 38, which is on page 16 --

17 THE COURT: It's at the bottom of page 16?

18 MS. CENDALI: Correct.

19 THE COURT: Hold on for a second.

20 MS. CENDALI: Sure.

21 (Off the record.)

22 THE COURT: That's not the same question you just
23 asked this witness.

24 MS. CENDALI: I asked --

25 THE COURT: I believe your specific question -- you

1 asked this witness if Mr. Orton's likeness was included in
2 WWE to make it realistic. The objection was, it calls for
3 speculation.

4 I sustained the objection because you are asking
5 this witness why WWE included the likeness, without any
6 knowledge. That calls for speculation. This is something
7 different.

8 So, counsel, this is not impeaching at all and my
9 -- I don't know if it was meant to be impeaching, but my
10 ruling as far as the specific question that you asked calls
11 for speculation, that is my ruling and it stands.

12 MS. CENDALI: Your Honor --

13 Q. (BY MS. CENDALI) Ms. Alexander, would you agree
14 that a depiction of Randy Orton's likeness without his
15 tattoos would not be realistic?

16 A. No, ma'am, it wouldn't.

17 Q. Now, let's just go back to this. So, whether he's
18 on television or in video games, Mr. Orton looks like
19 himself; correct?

20 A. To a degree.

21 Q. And you understand that television is a digital
22 recreation of a real-life person; right?

23 A. To a degree.

24 Q. Well, we all know that when we're watching
25 something on television, they aren't there in real life;

1 right?

2 A. Of course. No.

3 Q. They're not really in your living room; you can't
4 reach in and take out a Randy Orton from the TV. Correct?

5 A. No, ma'am.

6 Q. So, television and photos also recreate what
7 somebody actually looks like; correct?

8 A. They directly record the person's image.

9 Q. And they are a recreation of that person's image;
10 right? It's not the real person.

11 A. I don't believe the term recreation in this case is
12 the same as what we're speaking about with the video games.

13 Q. That's not my question. You understand that in a
14 photograph or in a -- on television, you are still looking
15 at something that is not the person standing before you in
16 real life; correct?

17 A. Correct. It's the person as they are.

18 Q. Right. It's the -- it's not the real person,
19 right, Ms. Alexander?

20 A. Of course not.

21 Q. Okay. Now, you claim -- you testified that you
22 learned that Mr. Orton was appearing in WWE 2K when someone
23 who played the game brought it to your attention; correct?

24 A. That sounds right.

25 Q. And you would estimate that this occurred sometime

1 in 2014; correct?

2 A. 2016.

3 Q. well, when we spoke at your deposition, you
4 estimated that you were told about Mr. Orton appearing in
5 the WWE 2K games more than four years before that
6 deposition; correct?

7 A. It was so long ago, it's -- I don't remember exact
8 dates, ma'am.

9 Q. well, Ms. Alexander, more than four years before
10 that deposition would have been before January 15th of 2025
11 -- 2015; correct?

12 A. Again, I -- I -- kinda confusing me with the dates.

13 Q. well, isn't it true that at your deposition you
14 thought that you might have first seen the WWE 2K games
15 more than five years before your deposition?

16 A. I had not seen them, no.

17 Q. Didn't you say at your deposition that the WWE 2K
18 games, you might have seen them and been aware of Mr. Orton
19 appearing in the WWE 2K games more, as much as five years
20 before that deposition of January 2019?

21 A. I believe --

22 MR. SIMON: Objection, Your Honor. Could we get a
23 page and line number in the deposition?

24 MS. CENDALI: Okay.

25 THE COURT: Miss Cendali?

1 MS. CENDALI: Okay. So --

2 THE COURT: Proper impeachment. If you believe
3 that was her testimony, could you cite counsel and the
4 Court to the page and can we impeach in that way?

5 MS. CENDALI: Thank you, Your Honor. Sorry.

6 THE COURT: Mm-hmm.

7 MS. CENDALI: I am directing opposing counsel to
8 Ms. Catherine Alexander's deposition transcript at page 18,
9 line 21, through page 19, line 18.

10 Q. (BY MS. CENDALI) Ms. Alexander, at your deposition
11 I asked you the following question and you gave the
12 following answers:

13 "What -- are you saying that -- what caused you to
14 know that Randy Orton appears in the WWE 2K video
15 games?"

16 Answer: "It was brought to my attention by someone
17 who plays the game."

18 Question: "By whom?"

19 Answer: "I don't recall."

20 Question: "You don't remember who told you this?"

21 Answer: "No, ma'am."

22 Question: "Do you know when they told you this?"

23 Answer: "No, ma'am."

24 "Can you give me any period of time about when they
25 told you this?"

1 Answer: "I cannot."

2 Question: "Was it in the past two years?"

3 "No."

4 Question: "Was it in the past more than three
5 years ago?"

6 "Yes."

7 Question: "Was it more than four years ago?"

8 "Yes."

9 Question: "More than five years ago?"

10 Answer: "I'm not sure."

11 So --

12 THE COURT: Excuse me, counsel. That's not
13 impeaching.

14 MS. CENDALI: Can I refresh the witness's
15 recollection then that that's what she said in her
16 deposition?

17 THE COURT: No. No. No. No, Miss Cendali. If
18 we're going to impeach witnesses, we're going to do it
19 properly.

20 MS. CENDALI: Okay.

21 THE COURT: First of all, I have read and instruct
22 the jury to disregard that exchange on the reading of the
23 deposition and -- because that was not inconsistent.

24 Now, if there's a matter that you want to refresh
25 her recollection on, if you can do that appropriately --

1 but I'm not sure how you're refreshing her recollection.
2 she said in the deposition she didn't remember, and she's
3 saying now she didn't remember, so it's unclear to the
4 Court what the approach is here, Miss Cendali.

5 Q. (BY MS. CENDALI) Ms. Alexander, isn't it true
6 that, in approximately 2014, more than four years before I
7 took your deposition in January of 2019, is when this
8 person told you that Randy Orton appears in the WWE 2K
9 video games?

10 A. Ma'am, I don't remember.

11 MS. CENDALI: May I refresh her recollection as to
12 what she said in her deposition, Your Honor?

13 THE COURT: You may attempt to do that, yes.

14 MS. CENDALI: Okay.

15 Q. (BY MS. CENDALI) Your deposition transcript is in
16 the binder in front of you, Ms. Alexander.

17 THE COURT: Counsel, can we have a sidebar, please?

18 MS. CENDALI: Sure.

19 THE COURT: It may get us past this.

20 (Proceedings continued at the bench.)

21 THE COURT: Miss Cendali, again, and I don't think
22 you're trying to do anything that's untoward, but
23 refreshing a witness's recollection with their deposition
24 transcript, I don't think that's -- if you are trying to
25 establish that she at some point in her deposition

1 testified differently, then of course you need to impeach
2 her with that. My only issue is, what you just read in an
3 attempt for impeachment is not impeaching.

4 MS. CENDALI: I'm trying to solve the problem, Your
5 Honor. I -- you're not letting us play -- I understand --
6 any excerpts of her deposition testimony where she said
7 this. And I could read in -- I can ask her, was it more
8 than four years before your deposition? And -- and --

9 THE COURT: You did ask her that. She said she
10 doesn't remember.

11 MS. CENDALI: Right.

12 THE COURT: But the problem is, what you are
13 reading from the deposition is not inconsistent with that.
14 So, again, that is the purpose, and the only purpose, of
15 impeachment. So, it doesn't matter whether it's a video or
16 not. What the Court is not going to allow is you to
17 confront a witness with their deposition testimony that is
18 not inconsistent.

19 MS. CENDALI: Well, Your Honor, she's taking the
20 position now that this happened in 2016. I have a problem
21 because she's saying she doesn't remember. But I have
22 sworn testimony it was more than --

23 THE COURT: Well, if you read that sworn testimony,
24 it would be impeachment. But that's not what you read.

25 MS. CENDALI: So, I'm just trying to do -- I did

1 read in -- what is it you'd like me to do, Your Honor, to
2 resolve the problem?

3 THE COURT: I'd like you to either impeach her or
4 move on. The only thing I'm saying is, what you read is
5 not impeaching in terms of what her testimony has been.

6 MS. CENDALI: Well --

7 THE COURT: And what I'm not going -- so, that's
8 what you can't do.

9 MS. CENDALI: But --

10 THE COURT: If it's not impeaching, you cannot
11 confront her with that testimony.

12 MS. CENDALI: Could I just read in -- impeach her
13 then, Your Honor, if the -- the whole rest of it is too
14 long.

15 I'd like to impeach her then with page 18, lines 15
16 through 18, you know, where I asked, didn't she -- "was it
17 more than four years ago?" "Yes." "More than five years
18 ago?" "I'm not sure."

19 THE COURT: No, because that's not -- that's no
20 different than what she testified here.

21 MS. CENDALI: Yes, because she -- she answered yes,
22 Your Honor.

23 THE COURT: Miss Cendali, I have ruled and we're
24 moving on.

25 (Proceedings continued in open court, jury

1 present.)

2 Q. (BY MS. CENDALI) Ms. Alexander, isn't it true that
3 you -- this person told you about Mr. Orton appearing
4 realistically in video games sometime approximately six
5 years ago, in 2014?

6 THE COURT: Six years ago would be 2016.

7 MS. CENDALI: Excuse me.

8 Q. (BY MS. CENDALI) It's approximately eight years
9 ago, in 2014?

10 A. I don't -- I don't remember exactly when it was. I
11 even said in my deposition, I'm terrible with dates.

12 Q. Can you approximate at all -- but it could have
13 been in 2014, right, Miss Alexander?

14 A. Ma'am, I'm not sure.

15 Q. But -- and it could have been -- okay. But it
16 could have been in 2014, right?

17 THE COURT: Miss Cendali?

18 MR. SIMON: Objection.

19 MS. CENDALI: OKAY.

20 THE COURT: I get it, but you have asked that. I
21 ruled. We need to move on.

22 MS. CENDALI: Okay.

23 THE COURT: And actually, if you are moving on, we
24 need to take a quick break because the Court needs a break.

25 MS. CENDALI: That's fine, Your Honor.

1 THE COURT: No one else needs the bathroom? I do.

2 MS. CENDALI: That's fine, Your Honor.

3 COURTROOM DEPUTY: All rise.

4 THE COURT: So, we will be in recess until 3:15.

5 (Court recessed from 3:00 p.m. to 3:14 p.m.)

6 THE COURT: Miss Cendali, you may proceed.

7 MS. CENDALI: Thank you, Your Honor.

8 Q. (BY MS. CENDALI) Hello again, Ms. Alexander.

9 A. Hello.

10 Q. Now, you don't remember who told you about Mr.
11 Orton appearing in WWE 2K video games; right?

12 A. No, ma'am.

13 Q. But you do remember this person saying that the
14 wrestlers in WWE 2K video games look like they were in a
15 movie because it was really realistic; right?

16 A. Correct.

17 Q. And shortly after that, which may have been in
18 2014, you were told this, you looked at the video game
19 yourself; right?

20 A. I looked at the walk-out segment.

21 Q. And when you looked at this, you couldn't believe
22 the quality of the graphics in the game; right?

23 A. No, I couldn't.

24 Q. And in fact, you thought Mr. Orton was depicted
25 very realistically when you looked at it; right?

1 A. It looked very realistic.

2 Q. And in fact, you were impressed by the realism,
3 weren't you?

4 A. Yes, ma'am.

5 Q. And when you saw Mr. Orton appearing in WWE 2K, you
6 felt your rights were being violated; right?

7 A. Yes, ma'am, I did.

8 Q. And this may have been, as we discussed, in 2014.
9 And when you saw Mr. Orton appearing realistically in WWE
10 2K then, you didn't contact Take-Two; right?

11 A. No, ma'am, I did not.

12 Q. And you didn't try to contact Mr. Orton; right?

13 A. There was no reason to. No, ma'am.

14 Q. And you didn't contact WWE; right?

15 A. After the first phone call, I saw no reason to.

16 Q. well, we'll talk about that in a minute. But you
17 didn't do anything when, in around 2014, you saw Mr. Orton
18 appearing in a video game, like a movie, to alert Take-Two
19 that you had any issue with Mr. Orton being depicted
20 realistically in the game; right?

21 A. No, ma'am.

22 Q. And Take-Two, you know, kept releasing new video
23 games after 2014; right?

24 A. I assume so, yes.

25 Q. well, you know that after 2014 because you are

1 suing them, that Take-Two released 2K16; right?

2 A. Yes, ma'am, I do know.

3 Q. And you know that the next --

4 MR. SIMON: Your Honor?

5 THE COURT: Yes?

6 MR. SIMON: May we have a sidebar, please?

7 THE COURT: Yes.

8 (Proceedings continued at the bench.)

9 THE COURT: Yes, sir, Mr. Simon?

10 MR. SIMON: Your Honor, this is not relevant
11 because waiver -- waiver is a voluntary relinquishment.
12 Silence cannot be waived. And they keep going over this,
13 that she didn't call them, she didn't call them, she didn't
14 tell them. It's just not relevant.

15 THE COURT: What's the relevance, Miss Cendali?

16 MS. CENDALI: It goes to not just waiver -- where
17 we disagree on the law, and that will be subject to the
18 Court's instructions. We need to make our evidentiary
19 record -- also to the implied license. This is the heart
20 of the implied license.

21 THE COURT: What's the heart of the implied
22 license?

23 MS. CENDALI: Because it shows that she acted in a
24 way consistent with the idea that she did not -- that Mr.
25 Orton was able to use -- authorize his likeness in the

1 games. And this is vitally material evidence to that.

2 THE COURT: I don't know that that's an element of
3 implied license.

4 MS. CENDALI: Yes, it is.

5 THE COURT: Well, let me say this. All of those
6 are legal determinations. Okay? As far as what she did
7 and did not do? That dead horse has been beaten. She
8 admits that she never had any conversation, she never took
9 these steps.

10 And, oh, by the way, your questions now are
11 premised on 2014, which you are free to do that, but that's
12 not what she testified to.

13 So, again, I'm trying to give you some leeway here.
14 But I don't -- I don't agree with the extent to which you
15 are alleging that this is relevant and I am going to cut
16 that off.

17 MS. CENDALI: I'll try to move on, Your Honor.

18 THE COURT: Thank you.

19 (Proceedings continued in open court, jury
20 present.)

21 MS. CENDALI: May I proceed, Your Honor?

22 THE COURT: You may.

23 Q. (BY MS. CENDALI) So, let's move along to the near
24 present. You filed this lawsuit in April of 2018; correct?

25 A. Correct.

1 Q. And you filed it without giving any of the
2 defendants any prior notice; correct?

3 A. Prior notice?

4 Q. You didn't tell WWE, Take-Two, and you didn't tell
5 Mr. Orton that you were filing this before you filed it;
6 right?

7 MR. SIMON: Objection, Your Honor, relevance.

8 THE COURT: Sustained.

9 Q. (BY MS. CENDALI) Ms. Alexander, you mentioned
10 copyright registrations on your direct with -- do you
11 remember that?

12 A. Yes, ma'am.

13 Q. Okay. And you didn't file your copyright
14 registrations -- right? -- until March of 2018; correct?

15 A. Yes, ma'am.

16 Q. Did you ever tell Mr. Orton that you were filing
17 copyright registrations at any time?

18 MR. SIMON: Objection, Your Honor, relevance.

19 THE COURT: Sustained.

20 MS. CENDALI: Sidebar, Your Honor?

21 THE COURT: Sure.

22 (Proceedings continued at the bench.)

23 MS. CENDALI: Your Honor? This is a different
24 question and this goes to a different point of our implied
25 license defense that the -- that custom and practice was

1 not to get copyright registrations and that she did not --
2 he -- give him warning or tell him anything about how she
3 had filed for copyrights.

4 THE COURT: But that's not relevant to implied
5 consent. That's -- let's just hold on for a second. Let
6 me nip this in the bud. Hold on.

7 MS. CENDALI: I can explain that in the implied
8 license argument the law says --

9 THE COURT: No. No. No. I just asked you to hold
10 on, Miss Cendali.

11 MS. CENDALI: I'm sorry. Forgive me, Your Honor.
12 (Pause.)

13 THE COURT: So, actually, the elements of implied
14 license -- implied license is created when a person
15 requests the creation of the work; the creator makes that
16 particular work and delivers it to the licensee who
17 requested it; and, the licensor intends that the licensee
18 copy and distribute the work; objective evidence of the
19 copyright owner's intent is relevant.

20 what you are doing and what the areas that you are
21 going into, I don't see the connection.

22 MS. CENDALI: Well, Your Honor, in the *LimeCoral*
23 case, in the Seventh Circuit case of 2018, the Court said:
24 Absent a limitation imposed on the license at the time the
25 works were delivered, the license impliedly granted then

1 would encompass all of the rights of the copyright holder.

2 The Court also said that you look to objective
3 evidence --

4 THE COURT: I just went over that. I'm not saying
5 -- what I'm saying is, the areas that you are getting into,
6 this Court does not find that they are relevant to that. I
7 have given you some leeway but you are not going to keep
8 beating this drum.

9 MS. CENDALI: Okay, Your Honor, I'll move on.

10 THE COURT: All right.

11 (Proceedings continued in open court, jury
12 present.)

13 Q. (BY MS. CENDALI) Let's talk about this phone call
14 that you say you made in 2009 to WWE. Okay?

15 A. Yes, ma'am.

16 Q. Now, you don't remember who you spoke to; right?

17 A. I do not.

18 Q. Okay. And you don't know whether you spoke to a
19 lawyer; right?

20 A. I do not.

21 Q. And you don't have any notes from that call; right?

22 A. No, ma'am.

23 Q. And you didn't follow up in writing in any way
24 after that call; right?

25 A. No, ma'am.

1 Q. And the call was about a rumor that you had heard
2 that WWE was going to sell a product depicting your
3 tattoos; right?

4 A. Correct.

5 Q. And the product that you had heard a rumor about
6 was faux nylon sleeves; right?

7 A. Yes, that's correct.

8 Q. The call wasn't about video games; right?

9 A. No, ma'am.

10 Q. And to your knowledge, these faux nylon sleeves
11 never came out; right?

12 A. No, ma'am.

13 Q. Now, you testified on direct that this person -- I
14 believe you said -- could do whatever they wanted because
15 -- with Mr. Orton; is that right?

16 MR. SIMON: Objection, Your Honor. It's just not
17 clear to me what's being asked.

18 MS. CENDALI: Okay.

19 Q. (BY MS. CENDALI) I'm just trying to frame what you
20 had said on direct. Could you tell me what was said on
21 this call again?

22 A. By whom?

23 Q. By the person at WWE?

24 A. The person who represented themselves as a
25 authority at the number I called, which is WWE Legal, said

1 that Mr. Orton is their wrestler and they can do whatever
2 they want with him.

3 Q. was there anything else said on that call?

4 A. They made a offer to me, a rather insulting offer
5 of 450 dollars for complete basic ownership, from what they
6 said, of my custom tattoos to use as they wish. And I
7 declined because it was very insulting.

8 Q. You didn't mention that on your direct, did you?

9 A. I wasn't asked.

10 Q. And you didn't mention the 450 dollars when I asked
11 you what took place during that conversation at your
12 deposition; correct?

13 A. It wasn't asked.

14 Q. Didn't I ask you, at your deposition, to please
15 tell me everything you can about what you said and what the
16 person said to you in this conversation?"

17 A. Ma'am, I was nervous, so forgetting sometimes
18 happens. And I forgot.

19 Q. And you didn't mention it?

20 A. I didn't mention during the deposition? No, ma'am,
21 I did not.

22 Q. Okay. So, is it -- so, in 2009, in your view of
23 the world, you knew that WWE might be coming out with some
24 kind of merchandise involving Mr. Orton's tattoos; right?

25 A. I didn't know that.

1 Q. You heard a rumor that they might be; right?

2 A. I did hear a rumor, yes, ma'am.

3 Q. Okay. So, at this time in 2009, did you do
4 anything to look into whether there might be any other
5 products out there that might be showing Mr. Orton with his
6 tattoos?

7 A. No, ma'am.

8 Q. I take it you have heard of video games?

9 A. I have.

10 Q. Okay. Now, you also were asked some questions
11 about the Create a Superstar feature in the WWE 2K games.
12 Remember that?

13 A. Yes, ma'am.

14 Q. And you understand that, that the specific subpart
15 of the Create a Superstar feature that you were asked about
16 is called the body parts feature; right?

17 A. If that's what it's called, I believe you. Yes.

18 Q. Okay. But you understand that you could take Mr.
19 Orton's whole arm and back to create a superstar; right?

20 A. You can take a rendering of Mr. Orton's arms and
21 back to create a superstar.

22 Q. I don't think anyone's thinking that you would cut
23 off Mr. Orton's arm and back and put it in the --

24 A. I was referring to a digital copy.

25 Q. Right. Like -- like a photograph. So --

1 A. No.

2 Q. -- would you -- would you --

3 MR. SIMON: Objection, Your Honor, argument.

4 THE COURT: I'm sorry, Mr. Simon?

5 MR. SIMON: Argument.

6 THE COURT: It's sustained.

7 Q. (BY MS. CENDALI) You understood that this feature
8 wasn't limited to Mr. Orton's arms and back; right?

9 A. I do now.

10 Q. You understand that other wrestlers' body parts
11 were included; right?

12 A. Recreations of other wrestlers' body parts.

13 Q. And you -- as we talked about -- understand that
14 Mr. Orton believes that he gave permission to show his
15 likeness, image, in the video game; right?

16 A. Could you repeat the question, please?

17 Q. Sure. You understand that Mr. Orton gave WWE and
18 Take-Two permission to show his body in the video game;
19 right?

20 MR. SIMON: Objection, Your Honor, hearsay. And it
21 calls for a legal conclusion.

22 THE COURT: The question is what she understands.
23 That's overruled.

24 You can answer the question, Miss Alexander.

25 THE WITNESS: Yes, ma'am.

1 A. Not his body. It's a rendering of his body. But,
2 yes, I understand the rest of your question. But it's not
3 his body.

4 Q. (BY MS. CENDALI) Well, do you understand that this
5 body parts feature was put in the game by THQ?

6 A. I'm not familiar with THQ.

7 Q. Did you -- do you know when this body parts
8 feature, that you talked about on direct, was put in the
9 games?

10 A. No, ma'am.

11 Q. Do you know when it was taken out?

12 A. Whatever they had said earlier. I believe on maybe
13 the last two games, 17, and 18, I believe that they
14 mentioned that.

15 Q. So, let's -- let's move back a step and talk a
16 little about the inking process. Okay? Am I correct that
17 when you ink someone, the client normally selects the
18 subject matter of their tattoo?

19 A. Not always.

20 Q. Well, isn't it true that the client normally
21 selects the subject matter of their tattoo?

22 A. I'll say yes, for the purpose of where we're at.
23 But anymore, not completely, no.

24 MS. CENDALI: Mr. Simon, I direct you to Alexander
25 transcript page 77, lines 20 to 23 -- excuse me -- 76,

1 lines 20 to 23.

2 Q. (BY MS. CENDALI) Question: "And so does the
3 client normally select the subject matter of the
4 tattoo?"

5 Answer: "They do, yes."

6 Did you -- was that your testimony at the time?

7 A. At the time.

8 Q. You only help with the execution; correct?

9 A. With the execution and the creation.

10 MS. CENDALI: Mr. Simon, again, Alexander
11 transcript, page 51, lines 14 to 23.

12 Q. (BY MS. CENDALI) "And when you work with clients,
13 you try to help them pick something that fits how
14 they want to see themselves. Is that fair to say?"

15 Answer: "Not the subject."

16 Question: "What do you mean, not the subject?"

17 Answer: "I never choose the subject. Only help
18 with the execution."

19 Question: "So, who chooses the subject?"

20 Answer: "The client."

21 Was that your testimony at the time?

22 A. At the time, yes.

23 Q. And that was true in this case. Mr. Orton selected
24 the subject matter of each of his tattoos; right?

25 A. To a degree.

1 Q. Told you where he wanted the tattoos inked; right?

2 A. Correct.

3 Q. He told you what he wanted the tattoos to look
4 like; right?

5 A. More so the subject and, say, gray shade as opposed
6 to using black.

7 Q. So, as you were saying when he asked you to tattoo
8 the skulls tattoo on him, he said he wanted it in a soft
9 gray color so it would be in the background of the tribal
10 tattoos; right?

11 A. Yes, ma'am. That's correct.

12 Q. And he also told you he wanted the dove tattoo to
13 be in this soft gray, too; right?

14 A. Yes, ma'am. That's correct.

15 Q. And he told you he wanted you to ink a rose tattoo
16 on his arm in honor of his daughter; right?

17 A. Yes, ma'am.

18 Q. And he wanted it to be the only tattoo on his body
19 in color; correct?

20 A. Yes, ma'am.

21 Q. And he wanted his daughter's name underneath it in
22 Roman numerals with her birth date; right?

23 A. The birth date in Roman numerals, and her name in
24 beautiful script, yes.

25 Q. And, I take it, you only inked these tattoos on Mr.

1 Orton only after getting his permission to do so?

2 A. At his request, yes, ma'am.

3 Q. And some of the tattoos you inked on Mr. Orton were
4 additions to preexisting tattoos; right?

5 A. Correct.

6 Q. He asked you to create an addition to his existing
7 tribal upper back tattoo; right?

8 A. Yes, ma'am.

9 Q. And the existing tribal tattoo had been inked by
10 another tattooist at Goldenlands; correct?

11 A. That wasn't my understanding.

12 Q. You never heard that Mr. Glatstein had designed and
13 Mr. Daley had inked that original upper back tattoo?

14 A. No, ma'am. I wasn't there all the time.

15 Q. Do you have -- do you understand that it is
16 possible that Mr. Glatstein and Mr. Daley did that original
17 tattoo at Goldenlands?

18 A. Mr. Orton said differently.

19 Q. Okay. Well, Mr. Orton wanted you to add to the
20 tattoo in the same style as the original; correct?

21 A. To -- to follow the same style, yes.

22 Q. And you agreed to do that; right?

23 A. Of course.

24 Q. And you didn't feel like you needed to get the
25 permission of the original person, whoever they were, who

1 inked the tattoo, before you altered it and added to it at
2 Mr. Orton's request; right?

3 A. No, ma'am.

4 Q. And Mr. Orton also requested that you ink tribal
5 designs on his arms; is that right?

6 A. Correct.

7 Q. And you used, again, the same style of the tribal
8 design on his arms as the tribal design on his back; right?

9 A. It's similar in the way that it's black work with
10 shading of gray surrounding it, and white in between.

11 Q. And in your experience, clients have the right to
12 decide whether they want their tattoos removed; right?

13 A. Yes, ma'am.

14 Q. And they -- and tattooed people have the right to
15 alter or modify their tattoos using a different tattooist,
16 if they want?

17 A. Yes, ma'am, absolutely.

18 Q. And they can do all this without going back to the
19 permission -- for permission from the original tattoo
20 artist; right?

21 A. That's correct.

22 Q. And in fact, you understood that Mr. Orton,
23 himself, has altered the tattoos you originally inked on
24 him; right?

25 A. Yes, ma'am, I do.

1 Q. And you didn't feel Mr. Orton needed your
2 permission to do that; correct?

3 A. No, ma'am.

4 Q. And you know that when a client leaves your tattoo
5 shop, they might show other people their tattoos; right?

6 A. Correct.

7 Q. Clients might even buy dresses with open backs to
8 show off their tattoos; right?

9 A. They very well could.

10 Q. Or others might wear kinda muscle shirts to show
11 off their tattoos; right?

12 MR. SIMON: Objection, Your Honor, relevance.

13 THE COURT: Where are we going with this, Miss
14 Cendali?

15 MS. CENDALI: Pardon me?

16 THE COURT: Where are we going with this?

17 MS. CENDALI: Okay.

18 THE COURT: No, I'm asking you here. I mean --

19 MS. CENDALI: Okay, so let me move on.

20 Q. (BY MS. CENDALI) Ms. Alexander, if you do a good
21 job inking someone, that becomes a good source of referrals
22 for you; correct?

23 A. It can, but not necessarily.

24 MS. CENDALI: Alexander transcript, page 82, lines
25 18 to 21.

1 Q. (BY MS. CENDALI) Question: "Okay. Is it fair to
2 say, if you do a good job inking a person, that's a
3 good source of referrals for you?"

4 Answer: "Absolutely."
5 Was that your testimony at the time?

6 A. I'm sure it was.

7 Q. And inking a celebrity can also lead to referrals;
8 correct?

9 A. Of course.

10 Q. Now, moving on. You worked at at least five tattoo
11 shops in your career; right?

12 A. Give me a moment. (Pause.) That sounds about
13 right.

14 Q. well, you worked at Slinging Ink; right?

15 A. Correct.

16 Q. And at Pain Station; right?

17 A. Correct.

18 Q. Not a great name but, okay. You worked at Diablo
19 Ink; correct?

20 A. Correct.

21 Q. You worked at Sunshine Daydream; right?

22 A. That was The Pain Station in a different location.

23 Q. Gotcha. You worked at Goldenlands Tattoos; right?

24 A. Correct.

25 Q. And when you stopped working at Goldenlands, you

1 didn't tell all the people you inked there that you were
2 going to a new tattoo shop; right?

3 A. No, ma'am.

4 Q. And you didn't take with you the names and
5 addresses of the clients you inked at Goldenlands; right?

6 A. That is not a custom of tattoo shops, to provide
7 you with the information for your customers when you leave.

8 Q. And in fact, when you left subsequent tattoo shops,
9 you didn't tell all the clients you had inked there that
10 you were going to a new shop so they could find you; right?

11 A. No, ma'am, I did not.

12 Q. And you didn't take your clients' names and
13 addresses with you, either?

14 A. Only ones I was very familiar with.

15 Q. Now, you think that Mr. Orton should not be
16 permitted to be depicted realistically with his tattoos in
17 the WWE 2K games without compensating you; is that correct?

18 A. Correct.

19 Q. You are not aware, though, of any business you have
20 lost as a result of Mr. Orton being depicted in the WWE 2K
21 games showing his tattoos; right?

22 A. I can't speculate on any business I have lost. No,
23 ma'am.

24 Q. So, your answer is no?

25 A. No, ma'am, I don't speculate.

1 Q. You are not aware of any clients you have lost due
2 to the depiction of Mr. Orton in the WWE 2K games with his
3 tattoos; right?

4 A. Again, it's impossible to guess.

5 MS. CENDALI: Alexander transcript, page 186, lines
6 10 to 13.

7 Q. (BY MS. CENDALI) Question: "And you are not aware
8 of any clients you have lost due to the depiction
9 of Mr. Orton in WWE 2K with his tattoos; correct?"

10 Answer: "Correct."

11 Was that your answer at the time?

12 A. Yes, ma'am.

13 Q. And in fact, there were people who came to you
14 because they heard you had inked Mr. Orton's tattoos;
15 right?

16 A. I believe some did.

17 Q. And you don't consider yourself to be in
18 competition with Take-Two, do you?

19 A. No, ma'am.

20 Q. And you are not in competition with WWE either;
21 right?

22 A. No, ma'am.

23 Q. And to be clear, you haven't worked full time in
24 the tattoo industry since 2009; right?

25 A. Correct.

1 Q. Tattooing people is not your primary means of
2 support; correct?

3 A. I don't know exactly how to answer that. I have
4 tattooed people. I am supported by tattooing people, to a
5 degree.

6 Q. Okay. Well, let's -- let's move on from that. To
7 be clear, you've never licensed a tattoo you have inked on
8 anyone, to anyone; correct?

9 A. No, ma'am.

10 Q. And you have never licensed a tattoo for use in a
11 video game; correct?

12 A. No, ma'am.

13 MS. CENDALI: No questions at this time.

14 THE COURT: Mr. Krasik?

15 MR. KRASIK: No, Your Honor. No questions, Your
16 Honor.

17 THE COURT: All right.

18 MR. SIMON: I just have a couple follow-up.

19 REDIRECT EXAMINATION

20 BY MR. SIMON:

21 Q. Do you have any objection to Mr. Orton having
22 photographs of himself on a T-shirt?

23 A. No, sir.

24 Q. You mentioned you looked at -- when you heard about
25 the video games, you looked -- you were asked if you had

1 looked at the walk-out. Was that on a game or was that on
2 YouTube?

3 A. It was on like a YouTube, like, I -- I had looked
4 it up. I Googled it. And I'm sure the source was probably
5 YouTube.

6 Q. But you didn't have a game at that time to --

7 A. Oh, no, sir.

8 Q. Did Mr. Orton ever tell you that he wanted to give
9 anyone rights to make copies of the tattoos?

10 A. No, never.

11 Q. Did the defendants in this case ever ask for
12 permission to make copies of the tattoos?

13 A. No.

14 Q. In 2009, you did tell them that they couldn't make
15 copies of the tattoos; right?

16 A. I did.

17 MR. SIMON: That's all, Your Honor.

18 MS. CENDALI: No further questions, Your Honor.

19 THE COURT: Thank you.

20 Thank you, Miss Alexander. You may step down.

21 Please watch your step.

22 Are you ready for your next witness, Mr. Simon?

23 MR. SIMON: Yes, Your Honor.

24 We have a 16-minute combined video clip that we'd
25 like to play, and it is of the Take-Two defendants through

1 the witness Chris Snyder. And it is Plaintiff's Trial
2 Exhibit 158.

3 (Whereupon, the videotaped deposition of Chris
4 Snyder, dated August 14, 2019, Plaintiff's Exhibit 158, was
5 played to the jury at this time.)

6 MR. SIMON: That's the end of that testimony, Your
7 Honor.

8 Ryan Clark is our next witness, and we can finish
9 him before.

10 THE COURT: Are you admitting any exhibits?

11 MR. SIMON: Oh, yes. I'm sorry.

12 MR. FRIEDMAN: Your Honor, we would move for
13 admission of PTX 26, 27, and 28.

14 THE COURT: Any objection?

15 MS. CENDALI: No objection, Your Honor.

16 THE COURT: Plaintiff's Exhibits 26, 27, and 28 are
17 admitted.

18 MR. FRIEDMAN: Thank you, Your Honor.

19 Your Honor, with permission, plaintiffs call Mr.
20 Ryan Clark as our final witness.

21 (Witness sworn by courtroom deputy.)

22 THE WITNESS: It's Ryan Clark. The last name
23 C-L-A-R-K.

24 * * * * *

25 RYAN CLARK,

1 having been first duly sworn, was examined and testified as
2 follows:

3 DIRECT EXAMINATION

4 BY MR. FRIEDMAN:

5 Q. Good afternoon, Mr. Clark.

6 A. Good afternoon.

7 Q. Welcome. And please state your name for the record
8 and introduce yourself to the jury.

9 A. My name is Ryan Clark, and I'm a CPA.

10 Q. Mr. Clark, did my law firm hire you to take a look
11 at some of the financial issues involved in this case?

12 A. Yes.

13 Q. All right. And did my law firm provide you with a
14 number of materials --

15 A. Yes.

16 Q. -- to review?

17 A. Yes.

18 Q. Just in general, what did those materials include?

19 A. They included various expert reports and any of the
20 documents that those experts relied upon.

21 Q. Mr. Clark, if you could, I'm having a little
22 trouble hearing. Could you pull that a little bit closer?

23 A. Sorry.

24 Q. Thank you.

25 Mr. Clark, you stated that you are an accountant.

1 Could you let the jury know your educational background,
2 starting with your undergrad?

3 A. Sure. I've got Bachelor of Science degree in
4 Accounting in Business Administration from Truman State
5 University. And I also have a MBA from St. Louis
6 University.

7 Q. Mr. Clark, you have a binder of materials in front
8 of you right now. Could you turn to Exhibit No. 38? It's
9 the second to the last in, in the binder you have?

10 A. (Complies.)

11 Q. Mr. Clark, do you recognize this document,
12 Plaintiff's Exhibit No. 38?

13 A. I do.

14 Q. What is it?

15 A. It's a copy of my CV.

16 Q. Okay. And your CV -- your CV lists a number of
17 pertinent information about your professional background,
18 including your education, previous work history,
19 certifications, publications, things like that; is that
20 right?

21 A. That's correct.

22 Q. You probably didn't need to review that to let the
23 jury know where you went to undergrad and graduate school,
24 but is this CV current and up to date?

25 A. Yes, it is.

1 MR. FRIEDMAN: Okay. Your Honor, I'd move for
2 admission of Plaintiff's Exhibit 38 into evidence?

3 MR. ILARDI: No objection, Your Honor.

4 THE COURT: Plaintiff's Exhibit 38 is admitted.

5 MR. FRIEDMAN: Thank you.

6 Mr. Zidzik, could you please pull up Plaintiff's
7 Exhibit No. 38 and publish to the jury. And you can go to
8 the second page, under Professional Certifications.

9 Q. (BY MR. FRIEDMAN) Mr. Clark, when did you obtain
10 your graduate degree at St. Louis University?

11 A. In 1998.

12 Q. Okay. And since then, have you obtained any
13 professional licenses in your field of accounting and
14 finance?

15 A. I have.

16 Q. Let us know which ones.

17 A. Sure. I'll start with the CPA, the Certified
18 Public Accountant. I received that license in May -- on
19 May 25, 2000.

20 Q. And you are, as stated in your CV, you are a
21 Certified Valuation Analyst?

22 A. Sure. I have two credential certifications in
23 Business Valuation and IP Valuation. One is the Certified
24 Valuation Analyst, which is issued by the National
25 Association of Certified Valuation Analysts, as well as

1 accredited in Business Valuation, which is issued by the
2 American Institute of Certified Public Accountants.

3 Q. It also states in your resume that you are
4 accredited in Business Valuation. Is that what you just
5 explained?

6 A. It was.

7 Q. Okay. It also says that you are certified in
8 Financial Forensics. What does that mean?

9 A. So, that's a certification from the American
10 Institute of Certified Public Accountants. And it is
11 issued to those who have experience in, in forensic
12 accounting, and that means using your accounting education
13 and background in an investigative manner.

14 Q. What is investigative manner? What is meant by
15 forensic accounting? What kinds of things do forensic
16 accountants do?

17 A. We investigate various matters. So, if there is
18 suspicion of any wrongdoing at a company or suspicion of
19 fraud, we will investigate those type of matters and look
20 into the accounting records and such.

21 Q. Mr. Clark, do any of these certifications or
22 accreditations require you to take an examination?

23 A. They do.

24 Q. Which ones?

25 A. They all require exams that you have to pass.

1 Q. Let's take just the CPA exam. Could you tell the
2 jury a little bit about what it takes to pass the CPA exam?

3 A. Sure. The CPA exam, it's a four-part exam. I
4 believe it -- they estimate it takes around 16 hours to
5 complete. And in order to sit for that exam, you have to
6 have 150 hours of undergraduate hours. So, it's equivalent
7 to five years in college.

8 Q. Thank you, Mr. Clark. You are also affiliated with
9 a number of professional societies. Is that fair?

10 A. That's fair. Correct.

11 Q. Having to do with accounting and forensic
12 accounting and intellectual property valuation?

13 A. Yes.

14 Q. Where are you currently employed?

15 A. Hoffman Clark.

16 Q. Are you the Clark in Hoffman Clark?

17 A. I am.

18 Q. You are one of the founding members of Hoffman
19 Clark?

20 A. I am.

21 Q. What is it that Hoffman Clark does?

22 A. So, Hoffman Clark is a certified public accounting
23 firm. We -- our specialty is consulting in the areas of
24 intellectual property, valuation and, and just general
25 business consulting.

1 Q. How long has Hoffman Clark been in existence?

2 A. So, it's been 19 years. Since 2003.

3 Q. Congratulations.

4 A. Thank you.

5 Q. What types of companies does Hoffman Clark consult
6 or advise?

7 A. It's various types. It kinda runs the gamut from
8 construction to real estate to technology-type companies.

9 Q. Is litigation or providing opinions for folks who
10 might be contemplating or in litigation something that
11 Hoffman Clark does?

12 A. It is. It's essentially what we had started the
13 firm back in 2003 to do, was to work in the area of
14 litigation, but also do consulting and valuation and things
15 of that matter.

16 Q. Thank you, Mr. Clark.

17 Mr. Clark, do you have any particular interest in
18 intellectual property valuation or licensing?

19 A. The firm, we do some work in that area, in
20 intellectual property valuation. But say, primarily our
21 work in the IP area is, is in the litigation setting,
22 though.

23 Q. Okay. Thank you, Mr. Clark.

24 Mr. Clark, I take it, based on your background and
25 what you have been doing for your career thus far, you have

1 experience on the topic of interpreting financial
2 statements; right?

3 A. I do.

4 Q. So, financial statements talking about these large
5 spreadsheets that have a lot of numbers and rows and
6 columns; right?

7 A. That's correct.

8 Q. Often a lot of mathematical analysis involved in
9 those?

10 A. That's correct.

11 Q. And to that extent, do you have experience in
12 valuing damages from a litigation context?

13 A. Yes, I do.

14 Q. Okay.

15 MR. FRIEDMAN: Your Honor, at this time, I would
16 offer Mr. Ryan Clark as an expert on behalf of the
17 plaintiff in the area of damages and accounting?

18 MR. ILARDI: No objection, Your Honor.

19 THE COURT: The Court certifies and the record
20 would note that Mr. Clark is an expert in the area of
21 financial analysis and damages.

22 MR. FRIEDMAN: Thank you.

23 Q. (BY MR. FRIEDMAN) Mr. Clark, before we turn to
24 your opinions --

25 THE COURT: No. No, not before you turn to 'em --

1 MR. FRIEDMAN: Turn to his opinions.

2 THE COURT: It's 4:30, counsel.

3 MR. FRIEDMAN: Thank you, Your Honor.

4 THE COURT: Let's do a quick sidebar.

5 (Proceedings continued at the bench.)

6 THE COURT: Just because I don't want anybody to be
7 taken by surprise, if we're not done at 4:30, this witness
8 is going to have to come back tomorrow.

9 MR. FRIEDMAN: Thank you, Your Honor. Understood.

10 THE COURT: All right.

11 (Proceedings continued in open court, jury
12 present.)

13 Q. (BY MR. FRIEDMAN) Mr. Clark, I asked you earlier
14 whether my firm asked you to look into some of the
15 financial aspects of this litigation; right?

16 A. Correct.

17 Q. Okay. And did we ask you specifically to look at
18 remedies and damages for copyright infringement?

19 A. You did.

20 Q. Do you have an understanding of the remedies that
21 exist under the law for copyright infringement?

22 A. Yes.

23 Q. Okay. Mr. Clark, what is your understanding of the
24 remedies for copyright infringement and the assessment of
25 damages in a case such as this one?

1 A. It's my understanding --

2 MR. ILARDI: Objection sustained.

3 THE COURT: What's your objection, counsel?

4 MR. ILARDI: Your Honor, it calls for a legal
5 conclusion.

6 THE COURT: Sustained.

7 Q. (BY MR. FRIEDMAN) Mr. Clark, could you turn in
8 your binder to Tab No. 29 -- I'm sorry -- Tab No. 28.
9 Plaintiff's Exhibit 28.

10 Mr. Clark, do you recognize Plaintiff's Exhibit 28?

11 A. I do.

12 Q. And in fact, Plaintiff's Exhibit 28 has already
13 been admitted in this case.

14 Mr. Clark, is Plaintiff's Exhibit 28 one of the
15 documents you utilized in order to assess some of the
16 financial aspects of this case?

17 THE COURT: Hold on for a second, counsel. You
18 said Plaintiff's Exhibit 28?

19 Has that been admitted, Stacie?

20 MR. FRIEDMAN: 28 has. I called it 29. I may have
21 just done it again. I'm referring to Plaintiff's 28.

22 THE COURT: If you called it 29 -- then it hasn't
23 been admitted as 28, counsel. So, is this --

24 MR. FRIEDMAN: I misstated it.

25 THE COURT: Hold on. Time out. We have to keep

1 the record straight, counsel.

2 Miss Hurst, do you have Plaintiff's Exhibit 28
3 admitted into evidence?

4 COURTROOM DEPUTY: No, I do not.

5 THE COURT: It has not been admitted.

6 MR. FRIEDMAN: I'm sorry, Your Honor. I thought I
7 had sought for the admission of Plaintiff's Exhibit 28
8 following the deposition video of Mr. Snyder.

9 THE COURT: I do not have it in the record, Mr.
10 Friedman. We can spend time arguing about --

11 COURTROOM DEPUTY: Oh, yes. Yes, I'm sorry.

12 THE COURT: So you have --

13 MS. HURST: Yes, we do have it.

14 THE COURT: Okay. I apologize. It's Miss Hurst's
15 fault.

16 Okay, let's get to it. Plaintiff's Exhibit 28 is
17 in evidence and you may question this witness about
18 Plaintiff's Exhibit 28.

19 MR. FRIEDMAN: Thank you, Your Honor.

20 Q. (BY MR. FRIEDMAN) Mr. Clark, Plaintiff's Exhibit
21 28, what is it?

22 A. It's -- my understanding is -- a spreadsheet that
23 was prepared by the defendants for this litigation.

24 Q. Thank you. And it contains a number of financial
25 data. Is that fair?

1 A. That's fair, yes.

2 Q. Are you basing your opinions today on this
3 spreadsheet and others like it?

4 A. Yes.

5 MR. FRIEDMAN: Mr. Zidzik, could you please publish
6 Plaintiff's Exhibit 28? Just start on the first page.

7 Q. (BY MR. FRIEDMAN) Mr. Clark, could you walk the
8 jury through how this document is set up? You are much
9 more familiar with it. Just briefly from a high level, and
10 we can turn the pages and end up at the end.

11 A. Sure. This document has the total units for the
12 WWE games. It has the gross sales, net sales, cost of
13 goods sold, gross profit and operating profit margins
14 depicted for each year of the game for, I believe, '16,
15 '17, and '18, and then it also totals it up in total.

16 Q. Mr. Clark, was this document audited?

17 A. No, not to my knowledge.

18 Q. Okay. Does this document contain gross revenue
19 information for each game 2K16, 17, and 18?

20 A. It does.

21 Q. Mr. Clark, did you do a calculation as to the gross
22 revenues for the WWE 2K16, 17, and 18 games?

23 A. I did.

24 Q. Mr. Clark, what were -- what are the gross revenues
25 for the WWE 2K16, 17, and 18 games?

1 A. So, I'd have to total those up or refer to my
2 report for that.

3 Q. Yeah, if you could take us through. And can you
4 determine that from Exhibit 28?

5 A. I can. So, what we're looking at right now, I
6 believe, is just the gross revenue for WWE 16. And so,
7 that contains three of the fiscal years. So, we'd have to
8 total up each of those years. And I understand that
9 there's a short year, as well.

10 Q. Mr. Clark, have you already done these
11 calculations?

12 A. I have.

13 Q. And what is your conclusion? What are the total
14 gross revenues for all the games 2K16, 17, and 18 combined?

15 A. The exact amount is in my report and I'd like to
16 refer to that. I'd --

17 MR. ILARDI: No objection, Your Honor.

18 MR. FRIEDMAN: To refreshing his memory?

19 Q. (BY MR. FRIEDMAN) Mr. Clark, if you could turn in
20 your binder to Tab No. -- February 2019 report, rebuttal
21 expert report.

22 THE COURT: What's the tab number, counsel?

23 MR. FRIEDMAN: It's the second tab in the exhibit
24 binder.

25 A. Okay. (Complies.)

1 Q. (BY MR. FRIEDMAN) Mr. Clark, does looking at this
2 document that you wrote refresh your recollection as to
3 what the gross revenue numbers are?

4 A. It does.

5 Q. Mr. Clark, what are the gross revenues for the WWE
6 2K16, 17, and 18 video games?

7 A. The gross revenues for the 2K16, 17, and 18 video
8 games, for the period April 2015 through August 2018, is
9 418,692,526 dollars.

10 Q. Thank you, Mr. Clark.

11 Now, Mr. Clark, during opening statements in this
12 case the defendants introduced a Mr. Malackowski as an
13 economist from Chicago. He may testify as to the
14 deductible expenses, the profitability of the 2K games, and
15 other areas. Are you available to sit in the courtroom
16 tomorrow or the next day and hear that testimony?

17 A. I am.

18 Q. Okay. And if you have additional opinions that may
19 be helpful to the jury in rebuttal, will you be available
20 to briefly address those issues, to come back after the
21 defendants put on their case and provide those additional
22 opinions or observations?

23 A. Yes.

24 Q. And just to be clear, the revenue number that you
25 just stated, did that apply just to the defendants, the

1 Take-Two defendants?

2 A. It's -- yes. It's related to the sale of those
3 games.

4 Q. Okay.

5 A. Yeah.

6 Q. Not with respect to the WWE defendant.

7 A. Correct.

8 Q. Thank you, Mr. Clark.

9 MR. FRIEDMAN: No additional questions at this
10 time. Subject to recall in rebuttal.

11 THE COURT: Could we have a quick sidebar, please?
12 (Proceedings continued at the bench.)

13 THE COURT: Is this Mr. Ilardi? I don't recognize
14 people with their mask on. Is this Mr. Ilardi?

15 MR. ILARDI: This is, Your Honor.

16 THE COURT: Okay. Mr. Ilardi, I would assume you
17 have more than ten minutes for this witness --

18 MR. ILARDI: That is correct.

19 THE COURT: All right. So, here's the deal. My
20 understanding is, he is going to be sitting in the
21 courtroom tomorrow anyway. So, he will be here -- Mr.
22 Clark will be here. I'm not going to have counsel rush
23 through his cross-examination under those circumstances and
24 I really don't intend to go past 4:30.

25 So, that being the case, why don't we just cut it

1 off today. Let Mr. Ilardi conduct his examination first
2 thing in the morning.

3 MR. FRIEDMAN: No objection from plaintiff.

4 MR. ILARDI: That's okay with us, Your Honor. It
5 will just -- our intention was to do a short cross of this,
6 and we will cross him again --

7 THE COURT: I don't trust lawyers when they say --
8 they don't do anything within 10 minutes other than pack up
9 their bags and walk out the door. And I don't really want
10 to pressure you. I don't need to -- just do what you need
11 to do. He's going to be here. We'll do it in the morning.

12 MR. ILARDI: Okay. Your Honor, if that's what you
13 prefer, that's okay with us.

14 THE COURT: And I'm glad that's okay with you, Mr.
15 Ilardi. You were raised right. You're so mannerable.
16 Okay. Thank you.

17 (Proceedings continued in open court, jury
18 present.)

19 THE COURT: Okay. So, we're going to go ahead and
20 recess for the day.

21 I will tell you -- this may help you with your
22 evenings -- I think we're still on track to be finished by
23 Friday. And so, please, remember my instructions and
24 admonitions to you. Don't discuss the case, don't do any
25 research. Be safe going home and we'll see you tomorrow

1 morning. We will reconvene at 9:00 a.m.

2 And, Juror No. 8, I need you to attach yourself to
3 Jurors No. 1 and 7 when they walk back in the courtroom
4 tomorrow morning at 9:00. Please be here at 8:45.

5 (Court adjourned at 4:21 p.m.)
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12 REPORTER'S CERTIFICATE

13 I, Christine Dohack LaBuwi, RDR, CRR, Official
14 Court Reporter for the U.S. District Court, Southern
15 District of Illinois, do hereby certify that I reported
16 with mechanical stenography the proceedings contained in
17 pages 90-289; and that the same is a full, true, correct
18 and complete transcript from the record of proceedings in
19 the above-entitled matter.
20

21 DATED this 5th day of October, 2022,
22

23 *s/Christine Dohack LaBuwi, RDR, CRR*

24 _____
Christine Dohack LaBuwi, RDR, CRR
25